United States Court of Appeals

for the Second Circuit

APPENDIX

75-7165
75-7166

United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,

against

UNITED BRANDS COMPANY,
Defendant-Appellee.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,

against

COMPANIA AGRICOLA DE GUATEMALA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
JUL 16 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX—VOLUME I

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RELEVANT DOCKET ENTRIES

International Railways of Central America
v. United Brands Company

Date	Filings - Proceedings
Feb. 16, 1965	Filed complaint, issued summons
April 22, 1965	Filed amended complaint
May 4, 1965	Filed defendant's answer to amended complaint
May 4, 1965	Filed defendant's notice of motion and affidavit for partial summary judgment
May 11, 1966	Filed plaintiff's notice of motion, affidavit and 9(g) for partial summary judgment
May 17, 1966	Filed judgment & order -- 1st, 2nd, 4th and 6th claims of amended complaint & so much of the 3rd & 5th as relate to matters occurring before 2-16-61 are dismissed on ground of res judicata -- all claims of amended complaint other than that portion of the 5th are dismissed on ground of 4 year statute of limitations -- pltff's motion for partial summary judgment denied -- Ryan, Ch. J -- judgment entered 5-17-66- Clerk
May 20, 1966	Filed judgment -- & order -- dismissing 1st, 2nd, 4th & 6th claims of the amended complaint and so much of the 3rd & 5th claims as relate to matters occurring before 2-16-61 -- Pltff's motion for partial summary judgment is denied --, etc. -- Ryan, J.- Judgment entered -- Clerk
Feb. 17, 1966	Filed USCA order with opinion attached -- that order of district Court denying pltff's motion for partial summary judgment be and it hereby is affirmed -- It is further ordered - adjudged and decreed that the order granting deft's motion be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court -- Judgment entered 2-24-67 -- Clerk.

Date	Filings - Proceedings
March 10, 1967	Filed order -- that Par. 1 of said judgment of this Court dated 5-20-66 is reversed and set aside-Par. 2-3-4-&5 of said judgment of this court dated 5-20-66 be and are hereby affirmed -- Ryan, J. Judgment entered 3-10-67-Clerk.
July 1, 1971	Filed Stipulation & Order that the caption of this action shall be changed to reflect the new name of deft, which was recently changed from United Fruit Co. to United Brands Co.
Dec. 17, 1971	Filed Stip & Order that the fourth claim of the amended complaint, and no other, is withdrawn with prejudice and with each party to bear its own costs and attys fees.
Feb. 2, 1972	Filed Consent Order of substitution of attorneys. Firm of Kaye, Scholer, Fierman, Hays & Handler of 245 Park Avenue,NYC now counsel for United Brands Co. in place of Davis, Polk. So Ordered.
Feb. 14, 1972	Filed Stip & Order that 72 Civ 649 be consolidated into this action for all purposes. Jury trial has not been, and shall not be, demanded or requested by any party. Deft's rights to amend its answer in the 2d captioned action (72 649) and pltff's rights to amend its complaint in the action 72 649 shall be the same as the rights they would have had in the action by Int'l Railways of Central America vs. Compania Agricola de Guatemala commenced 10-8-68 and pending in the U.S.D.C. Mass. Civ-action 68-905-M and in particular, deft shall not plead the statute of limitations except insofar as the answer in the Dist. of Mass action could have been amended to so plead. Deft in the 72 action waives any objection to the venue. As soon as the within Stip. is approved by Court, the parties shall file their stipulation of dismissal, Mass. action, with that Court. So Ordered.
Oct. 4, 1972	Filed deft's affidavit & notice of motion ret. before Gurfein, J. for summary judgment.
May 9, 1973	Filed OPINION #39465 Gurfein, J. The motion for summary judgment dismissing the claims indicated for lack of standing to sue is denied. It is so ordered.

Date	Filings - Proceedings
Oct. 3, 1973	Filed pre trial order #1.
Dec. 13, 1973	Filed (on oral direction from chambers) AMENDED AND SUPPLEMENTAL COMPLAINT for damages and other relief for violation of anti-trust laws.
Dec. 19, 1973	Filed ANSWER of defendant to amended and supplemental complaint.
Jan. 23, 1974	Non-Jury trial begun before Gurfein, J. as to Liability only, Trial continued on January 24, 25, 28, 29, 30, 31, February 1, 4, 5, March 5, 6, 7, and concluded on March 11, 1974 as to liability only.
April 26, 1974	Filed OPINION #40643....In view of the rulings herein I will give each party ten days from the date of filing this opinion to request a further evidentiary hearing, with a specific statement of the facts the party intends to prove. If no request is made, the trial on liability alone shall be deemed to have been concluded. The schedules for briefing and days for oral argument remain in effect. It is so ordered. - Gurfein, J.
May 15, 1974	Filed OPINION #40643....For reasons stated, I see no reason for further evidence to be taken in the trial on liability. That trial may be considered closed, and the parties will adhere to the briefing schedule heretofore ordered. It is so ordered -- Gurfein, J. (supplemental opinion)
Jan. 29, 1975	Filed the Court's FINDINGS OF FACT AND CONCLUSIONS OF LAW #41825-A...Gurfein, J. (sitting by designation)
Jan. 29, 1975	Filed OPINION #41825...This is an opinion after trial on the issues of liability only. An earlier opinion on the motion for summary judgment by the defendants stated the history of the litigation between the parties and the claims in the present complaint. The summary judgment motion was denied, but partial summary judgment was granted dismissing the antitrust claims for acts committed before 2-16-61 and dismissing the contract claims v. United Brands, formerly United Fruit Co. for breaches committed before 12-31-62 and before 1-1-61. Breaches of contract claimed v. Co. Agricola de Guatemala

Date	Filings - Proceedings
Jan. 29, 1975	(continued from prior page) they were dismissed if committed after 12-31-62 and before 10-9-62. I find, after trial, that the plaintiff has not proved that the reduction in shipments was substantially caused by other than agronomic factors. For all the reasons stated herein, the complaint is dismissed. Judgment will be entered for the defendants. -- Gurfein, J. (sitting by designation)
Feb. 7, 1975	Filed JUDGMENT AND ORDER that the action be dismissed on the merits and with prejudice, and that the defendants United Brands Co. and Compania Agricola de Guatemala recover their costs after action from the plaintiff International Railways of Central America. -- Clerk.
March 6, 1975	Filed pltf's notice of appeal to the USCA for the 2nd Circuit from final judgment entered 2-7-75, incl. without limitation review of Decision #41825, Findings of Fact and Conclusions of law 41825-A entered 1-29-75, decision #40643 and orders entered 4-26-74 and May 15, 1974 and decision #39465 and order entered 5-9-73-copy mailed to Kay Scholer Fierman Hays & Handler, Esqs.
March 6, 1975	Filed pltf's Undertaking for costs on appeal - $250.00 - Fed. Ins. Co.

International Railways of Central America
v. Compania Agricola De Guatemala

Feb. 14, 1972	Filed complaint and issued summons
Feb. 14, 1972	Filed Answer to complaint
Feb. 14, 1972	Filed stipulation and order consolidating this action into 65 Civil 479 for All purposes. So ordered. MacMahon, J.

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INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY, Defendant-Appellee.

No. 178, Docket 30633.

United States Court of Appeals
Second Circuit.

Argued Nov. 29, 1966.

Decided Jan. 27, 1967.

Railroad company brought action in February 1965 against fruit company, which had dominated the railroad company, for treble damages under antitrust laws going back to 1928 and for other relief. The United States District Court for the Southern District of New York, Sylvester J. Ryan, J., 254 F.Supp. 233, granted a motion for partial summary judgment by the fruit company and denied such a motion by the railroad company, and both appealed. The Court of Appeals, Friendly, Circuit Judge, held that while odds might have been against likelihood that board of directors of railroad company, which was dominated by fruit company, would have authorized antitrust action against fruit company between May 1959 and February 1961, but possibility of authorization of antitrust action could by no means be dismissed as negligible, any tolling of statute of limitations because of domination of railroad by first company had ceased by February 1961 since railroad had not borne burden of showing that board of directors as reconstituted in 1959 would not have authorized corporate suit.

Judgment affirmed in part and reversed in part.

1. Limitation of Actions ⇨195(3)

Plaintiff, who seeks to toll statute of limitations on basis of domination of corporation, has burden of showing full, complete, and exclusive control in directors or officers charged.

2. Limitation of Actions ⇨101½

While odds might have been against likelihood that plaintiff corporation's board of directors would have authorized antitrust action against plaintiff's controlling shareholder, the possibility cannot be dismissed as negligible since one-third of the board would seem to have been highly responsive to a shareholder's demand, the past board had recently been vigorously excoriated for their inaction by a referee in a related state action, the controlling corporation had been ordered to divest their holdings in plaintiff in a government antitrust suit, and the board must have been aware of the legal implications of arbitrary refusal to bring an apparently justified suit; thus statute of limitations for plaintiff's antitrust action against controlling shareholder was not tolled on basis of defendant's domination of plaintiff. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

3. Judgment ⇨592

Fact that successful state court derivative action for breach of fiduciary

duty for period from 1943 to 1960 was brought on behalf of corporation now bringing Clayton Act suit for period beginning in 1961 against same defendant does not bar latter suit on ground of splitting cause of action. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

Aaron Lewittes, New York City (Leventritt, Bush, Lewittes & Bender, New York City) (M. Victor Leventritt, Sidney Bender, Abraham K. Weber, New York City, of counsel), for plaintiff-appellant.

Ralph M. Carson, New York City (Davis, Polk, Wardwell, Sunderland & Kiendl, New York City) (Porter R. Chandler, Robert F. Dobbin, New York City, of counsel), for defendant-appellee.

Before LUMBARD, Chief Judge, and FRIENDLY and SMITH, Circuit Judges.

FRIENDLY, Circuit Judge:

This action was brought on February 16, 1965, by International Railways of Central America (IRCA) against United Fruit Company (UF) in the District Court for the Southern District of New York. The complaint, analyzed in more detail below, asserted six claims, the first four and the sixth seeking treble damages for breach of the antitrust laws, 15 U.S.C. § 15, and the fifth, predicated on the same facts as the third, primarily seeking damages for breach of contract. The asserted damages, going back in some instances to 1928, when trebled were in excess of a half billion dollars.

UF moved for summary judgment (1) dismissing the first, second, fourth and sixth claims and so much of the third and fifth as related to matters occurring before 1961, on the ground that their prosecution was barred by the final judgment awarding damages through December 31, 1960, in a derivative action brought in the New York courts by stockholders of IRCA (hereafter "the *Ripley* action") against that company as a nominal and UF as the real defendant; and (2) dismissing so much of the claims (other than the fifth insofar as it was based on alleged breach of contract) as related to matters occurring before February 16, 1961, as barred by the four-year statute of limitations for antitrust actions, 15 U.S.C. § 15b. Plaintiff countered with a motion for partial summary judgment as to UF's liability on the first, second, fourth and sixth claims and also as to damages on the second and sixth, mainly on the basis of the record and judgment in the *Ripley* action. Judge Ryan granted both branches of UF's motion and denied plaintiff's, 251 F.Supp. 233 (1966). A judgment was entered which made the recitals appropriate under Rule 54 with respect to the grant of defendant's motion and contained certification under 28 U.S.C. § 1292(b); we granted leave to appeal so that the entire matter might be before us.

I.

A statement, necessarily condensed, of the relations of the parties and of previous litigation is essential to understanding. For the former we draw largely on the findings made by the referee in the *Ripley* action in 1957, which were affirmed by the hierarchy of New York courts.

IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.

In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock owner-

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ship was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S. A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as "special adviser" to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder.

In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. Ripley v. International Railways of Central America, 276 App.Div. 1006, 95 N.Y.S.2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.[1] Although at the trial

1. For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retroactively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15½ cent per stem rate which had applied from 1929 to 1939 should be restored from 1943 through 1955. For import traffic he directed an increase of 10¢ per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that "equity and fair dealing indicate, and no doubt would require, similar annual rateable increases" for the cross-country traffic "until the rates equal those fixed for the general

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IRCA had opposed the plaintiffs and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, Ripley v. International Railways of Central America, 8 A.D.2d 310, 188 N.Y.S. 2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N.Y.2d 430, 209 N. Y.S.2d 289, 171 N.E.2d 443 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956–60 in the sum of $3,309,670.39, with interest.

In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate and would no longer ship bananas from western Guatemala over IRCA as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965.

We conclude this history with a summary statement of the six claims in the complaint:

First: loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other banana shippers from using IRCA, 1928–61, $75,000,000.

Second: utilizing IRCA to facilitate UF's monopolistic designs by granting it discriminatorily low rates, 1928–61, $55,000,000 less the principal paid on the state court judgment.

Third: restricting UF's own banana shipments over IRCA, 1949–64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000.

Fourth: monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from west coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher rail revenues it could have obtained if there had been effective steamship competition, 1928–61, $15,000,000.

Fifth: breach of contract to ship west coast bananas (damages included in third claim).

Sixth: acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U.S.C. § 18 (damages equal to aggregate alleged in first four claims).

public, (or so-called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $1,531,055.35, including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

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The total damages asserted, which may well contain some duplications, amounted to $169,000,000 and, when trebled, to $507,000,000.

II.

We consider first the defense of the four-year statute of limitations for antitrust actions, 15 U.S.C. § 15b, which Judge Ryan sustained save as to the claim for breach of contract. IRCA asserts that the statute did not start to run on any of the antitrust claims until UF relinquished its domination in January, 1962, even though most of the facts had been spread on public records long before, and that the action, brought in February, 1965, was thus timely. UF responds that "domination" as a basis for tolling the statute with respect to an antitrust claim ceases to apply to a corporation once the facts giving rise to the action have become known to independent directors or stockholders since they can bring a derivative action for treble damages on the corporation's behalf, as held in Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 36 A.L.R.2d 1336 (2 Cir. 1953). It contends that this condition was here met as to stockholders not later than the annual meeting in March, 1952, when, after a thorough and heated airing of many of the claims being advanced in *Ripley*, an opposition slate received some 204,000 votes as against 308,000 for the management and as to directors in 1959 when three "independent" directors were elected to the IRCA board.[2] Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the *Ripley* action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury.

The closest that the Supreme Court has come to dealing with this vexing problem is Curtis v. Connly, 257 U.S. 260, 42 S.Ct. 100, 66 L.Ed. 222 (1921). This was a suit in equity by the receiver of a national bank against former directors for losses sustained by the payment of dividends out of capital and by improper loans and investments. The suit was brought August 2, 1916, and the six defendants whose liability was at issue had resigned by early 1910. Mr. Justice Holmes considered the suit to have been brought "upon the common-law right of the bank to recover for acts that diminished its assets," 257 U.S. at 262, 42 S.Ct. at 100,[3] and accordingly treated the case as governed wholly by the Rhode Island statute of limitations without considering possibly more extensive federal principle The applicable Rhode Island statute was for six years with a proviso that "[i]f any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon

2. The three, Cunningham, Ruckle and Yaeger, were elected May 27, 1959, and remained as directors until 1963. Ruckle, a New Jersey automobile dealer who had owned a substantial amount of IRCA stock since 1954, was invited by McGovern of UF to have his name on the management slate for 1959; so apparently was Cunningham. The record does not show the circumstances as to the nomination and election of Yaeger who had been on the opposition slate at the stockholders' meeting of 1952; however, in view of the absence of cumulative voting, it is inferable that he too was on the "management" slate even though known to be hostile to UF.

3. We are not clear why this was so, since the bill apparently alleged acts constituting federal claims under Rev.Stat. § 5239, see the decision of the District Court, Curtis v. Metcalf, 259 F. 961, 963–964 (D.R.I. 1919), and Chesbrough v. Woodworth, 244 U.S. 72, 78–79, 37 S.Ct. 579, 61 L.Ed. 1000 (1917), but we take the opinion as we find it.

shall first discover its existence." The somewhat anthropomorphic view that "The bank, of course, must be charged with knowledge of what appeared upon its books," 257 U.S. at 262-263, 42 S.Ct. at 101, disposed of the claims of concealment of illegal investments and, apparently, also of illegal dividends. The only point further discussed was the carrying of loans on the books at inflated values, as to which the "bank" itself would not perceive the error since the entries tallied with the amount of the loans and the concealment was simply the weakness of the borrower's credit. As to this, notice was found in the election of three new directors between 1909 and early 1910 who came to the board, admittedly with knowledge of the facts, "as the eyes of the bank." 257 U.S. at 264, 42 S.Ct. at 101. The Supreme Court's opinion did not discuss, although those in the lower courts had, "the contention made, not with much apparent confidence, that the statute did not begin to run in favor of the retiring directors until the bank passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members * * *." Curtis v. Connly, 264 F. 650, 652–653 (1 Cir. 1920); see also Curtis v. Metcalf, 259 F. 961, 964–966 (D.R.I.1919). Examination of the briefs in the Supreme Court discloses that the appellant's argument on this score went not to domination as such but rather to knowledge. "Three-fifteenths of a board of directors," it was urged, "is not enough to make their knowledge tantamount to knowledge by the bank." Although the domination issue thus was raised by the facts, the Supreme Court seems not truly to have focused upon it; and while the decision must be taken into account, we do not consider it nearly so conclusive in defendant's favor as did the district judge.

The three precedents in this Court that have been cited to us [4] do not assist decision much further. In Michelsen v. Penney, 135 F.2d 409, 415 (2 Cir. 1943), an action by depositors and a receiver of a national bank against directors, we said that "the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers", and found that to be true until the receiver's appointment. But the directors other than Penney were "legally unqualified dummy directors," see 41 F.Supp. 603, 610 (S.D. N.Y.1941), and it was for that reason that the court, shifting at this point to a theory of concealment, concluded that "notice should not be imputed to the bank, because all these new directors were elected by the controlling Penney group, many of them were lent qualifying shares by this group, and none of them were independent in any real sense." 135 F.2d at 416, n. 2. In Austrian v. Williams, 103 F.Supp. 64 (S.D.N.Y.1952), an action by the reorganization trustee of Central States Electric Corporation against directors and others, Judge Weinfeld found that Williams' domination of Central States, as to which see his review of the facts, 103 F.Supp. at 71–75, "was so pervasive that it effectively prevented the proper institution of actions against him and the directors liable with him." Id. at 115. Since this sentence was followed by the statement, "The nature and extent of the domination was such as effectively to conceal by its very existence the significant facts of the transactions under attack", it is not clear whether Williams' domination alone would have been considered enough under the circumstances, and this court's view as to the inapplicability of federal principles made it unnecessary to resolve that issue here. Austrian v. Williams, 198 F.2d 697, 700–702 (2 Cir.), cert. denied, 344 U.S. 909, 73

4. We regard Laird v. United Shipyards, Inc., 163 F.2d 12, 15–16 (2 Cir.), cert. denied, 332 U.S. 842, 68 S.Ct. 264, 92 L.Ed. 413 (1947), as without relevance both because of the finding that at the time of the alleged breach of duty "all parties then having any interest in the corporation were fully aware of all the facts," and because the language "Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the corporation," clearly referred to the New York, not the federal, rule.

S.Ct. 328, 97 L.Ed. 704 (1952).[5] In Movielcolor Limited v. Eastman Kodak Co., 288 F.2d 80, 88, 90 A.L.R.2d 252 (2 Cir.), cert. denied, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26 (1961), we again recognized "adverse domination" of a corporation as a basis for tolling the statute with respect to a federal claim, and characterized it as "an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress." However, we were not required to mark out the boundaries of the doctrine since we found the complaint "falls far short of" alleging control by the wrongdoers.

While the parties have cited many other federal decisions going in various directions, we see little to be gained by detailed analysis of them.[6] Many did not have to, or at any rate did not, distinguish between domination *qua* domination, i. e., as affecting the ability to sue, and domination as effecting concealment. None involved control by a single owner, as distinguished from a majority of more or less guilty directors some of whom might decide that their liability in a suit brought by the corporation would be less than their liability for not bringing one. Almost all were actions in behalf of depositors in insolvent national banks. In some ways that point operates in favor of tolling since it seems hard to charge such creditors with the failures of knowledgeable stockholders or the delinquencies of knowledgeable and independent directors; in other ways it operates against it, because in many cases the facts were known by National Bank Examiners, "the real 'eyes of the bank'" and the Comptroller of the Currency could "compel restitution, resignation, or a receivership." Hughes v. Reed, 46 F.2d 435, 442 (10 Cir. 1931).

[1] One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." Payne v. Ostrus, 50 F.2d 1039, 1042, 77 A.L.R. 531 (8 Cir. 1931). Such control was found, for example, in Adams v. Clarke, 22 F.2d 957 (9 Cir. 1927), where all the directors were accused of wrongdoing and held a majority of the capital stock, and also in our *Michelsen*, case, supra. This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue. And here we think IRCA fails.

[2] While the odds may have been against the likelihood that IRCA's board of directors would have authorized an antitrust action against UF between May 1959 and February 1961, the possibility can by no means be dismissed as negligible. By that time, only four of the old-time directors remained. One of the replacements, Yaeger, would have been highly responsive to a stockholder's demand, see note 2, supra, and this also seems likely as to two others, Ruckle and Cunningham.[7] Nor can we simply assume that the other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA direc-

5. The opinion distinguished Michelsen v. Penney, supra, as expounding a "federal doctrine," 198 F.2d at 760, applicable to an action to enforce the liability of a national bank director, compare fn. 3, although the *Michelsen* opinion was by no means clear on that point, see 135 F.2d at 415, 416, n. 2.

6. A goodly number are cited in an elaborate footnote to the opinion in Michelsen, 135 F.2d at 416 n. 2. However, Judge Clark's law clerk failed him in one respect; the cases, other than Curtis v. Connly, cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.

7. Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961, in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation.

tors with whom he was concerned,[8] the very vigor of that then recent expression, its affirmance by the New York courts, the 1958 decree of divestiture in the Government's antitrust suit, and the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request. See Baker & Cary, Corporations, Cases and Materials 470-71 (1959); cf. Wolf v. Barkes, 348 F.2d 994, 996 (2 Cir.), cert. denied, 382 U.S. 941, 86 S.Ct. 395, 15 L.Ed.2d 351 (1965). In this connection, we find considerable significance in the changed position taken by IRCA in the *Ripley* action where in 1958, after the Referee's decision, it urged that the judgment "should be supported and increased," to reflect the full difference between the rates to UF and to independents. While this could be dismissed as cheap insurance for the directors with no real harm to UF since IRCA was merely supporting a position the plaintiff-stockholders were taking anyway, it is equally reasonable to regard it as meaning that the directors, even before the election of the three independents, had come to recognize their duty to protect the corporation once the spectre of loss of the UF contracts had been dissipated. Taking everything into account,[9] we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May 1959 and February 1961 by a stockholder or director would necessarily have been fruitless.[10] UF's control of IRCA thus was no longer "full, complete and exclusive" in the sense here relevant.[11] We

8. "It is difficult to consider with patience the lack of information, inquisitiveness, of prudent care, and of concern of these directors and principal managers of IRCA as testified to by themselves in respect of the very important items of rates and contracts and dealings between their own company, IRCA, and its principal customer-shipper, U. F. Co. These men, it is found, were otherwise as U. F. Co. states it 'upright and honorable men' of high standing and unblemished reputation. * * *"

9. The directors also could not have overlooked the risk of dislodgment despite UF's large stock interest. In the 1952 election five years before the Referee's findings in *Ripley*, the management slate received the votes of only some 51,000 shares other than the 256,000 owned by UF, the independents got some 204,000, and about 89,000 shares, or nearly 15%, did not vote. In an election that would have been featured by cries as to the majority's refusal to authorize a multi million dollar suit against UF arguably called for by the *Ripley* findings and with no risks save the expense of litigation, a considerably larger total vote and an even greater proportion against the UF slate would have been likely. With 95% of the stock voting, UF would have had to retain the suffrage of 29,000 of the independent shares to prevail. Even assembling a respectable management slate would not have been easy under the circumstances.

10. While this issue is one on which plaintiff might have been entitled to take evidence, it raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point.

11. IRCA cites Delaware & Hudson Co. v. Albany & Susquehanna R.R., 213 U.S. 435, 29 S.Ct. 540, 53 L.Ed. 862 (1909), which held that shareholders could bring a derivative suit without making the prior demands on management and the shareholder then required by Equity Rule 94 where a majority of the corporation's directors were officers or directors of the corporation alleged to have inflicted the injury, and the latter owned 22.9% of the injured corporation's stock. It argues that the question in that case was whether the plaintiffs could reasonably assume that management itself would not bring a suit in the corporation's interests when a majority of the board of directors was controlled by the prospective defendant; that the Supreme Court held in the affirmative; and that the question in this case is the same. Quite apart from the important distinction that only one of IRCA's directors in 1959 was an officer or director of UF, the problems are dissimilar. The basis for barring a derivative suit without prior demand is simply the lack of reason for such an action if the corporation is willing to sue itself, a principle adopted for the benefit of

thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to "domination" of a corporation by the alleged wrongdoer.

In upholding the partial defense of limitations in this case, we are thoroughly mindful that "[t]he treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute", Karseal Corp v. Richfield Oil Corp., 221 F.2d 358, 365 (9 Cir. 1955), and "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore make them more effective." Kinnear-Weed Corp. v. Humble Oil & Refining Co., 211 F.2d 891, 893 (5 Cir. 1954), cert. denied, 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955). See United States v. Borden Co., 347 U.S. 514, 518, 74 S.Ct. 703, 98 L.Ed. 903 (1954). But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill.[12] Moreover, the statute of limitations itself embodies a strong policy "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF.[13]

Since IRCA has not met its burden of demonstrating that, after the election of the three independent directors in 1959, UF had such "full, complete and exclusive control" as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or director, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the anti-

the very corporation that would profit from successful prosecution of the suit. We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception. Although the question asked in the two situations thus may be formally the same, a plaintiff must go further in negating the possibility of suit by the corporation in the situation here *sub judice* since tolling the statute of limitations is far stronger medicine than dispensing with a demand as a condition to the bringing of a derivative action and will impinge upon different interests.

12. Indeed, disregard of the statute of limitations might impede efforts by the Government to obtain divestitures by consent. If UF had retained its stock ownership in IRCA, it would have shared *pro tanto* in any recovery from itself; a controlling stockholder may well be reluctant to sell, at a price reflecting only usual business considerations, if the corporation under new ownership can recover treble damages reaching over decades. And there is surely some anomaly in a doctrine whereby although there could be no recovery against a former 100% stockholder, and a present 90% stockholder would suffer to the extent of only 10% of the amount recovered in a derivative action, 100% damages without limit of time could be obtained after a 90% stock interest was divested at a price in no way reflecting the claim.

13. Recovery of the damages sought, without taking account of income taxes, would amount to some $845 for each share of IRCA, and to some $62 per share of UF, currently selling around $31. While the *ad damnum* may be on the optimistic side and income taxes and deductions would cut the amounts roughly in half, the figures remain huge. Yet 68% of the common stock of IRCA is owned by a recent purchaser, and some notion as to how few of the minority stockholders date back to an early period is conveyed by the fact that of the 25 plaintiffs in the *Ripley* action, brought in 1963, only two had acquired their stock before 1945.

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trust laws arising prior to February 16, 1961, were barred by limitations.

III.

Our holding on the statute of limitations reduces the importance of the branch of UF's motion based on the rule against splitting a cause of action almost but not entirely to the vanishing point. With all claims prior to February 16, 1961, save so much of the fifth as concerns breach of contract,[11] barred by the four-year statute, the only remaining ones that would be excluded by the splitting rule are the antitrust claims relating to the period between that date and the dissipation of the effects of UF's control consequent on the sale of its stock in January 1962. Moreover, the second claim may have scant practical application to that relatively recent period in view of the provisions for rate increases in the *Ripley* judgment.

Starting from the doctrine that a plaintiff must recover all damages arising from given operative facts in a single action, Restatement, Judgments, § 62, defendant contends that the facts relied on by IRCA for recovery under the antitrust laws in this action are the same as those sued on by its stockholders in *Ripley*. Plaintiff disputes this; it claims that the rule against splitting is inapplicable when the first suit was brought in a forum which lacked power to give the relief sought in the second, thereby distinguishing such cases as Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464 (3 Cir. 1950), cert. denied, 341 U.S. 921, 71 S. Ct. 743, 95 L.Ed. 1355 (1951), Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5 Cir.1961), and Engelhardt v. Bell & Howell Co., 327 F. 2d 30 (8 Cir.1964); and it argues that in no event should the rule be applied when a forum without power to give full relief was chosen not by the corporation now plaintiff but by stockholders forced to act in its behalf because of an unwillingness to sue dictated by the defendant, especially when they were ignorant of antitrust violations when the suit was brought.[15]

On the point of fact raised by the argument, the situation seems as follows: The gravamen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action) and the rate divisions on coffee exports and commodity imports; nothing in it can fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for the damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedly made clear,[16] as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue. See 8 N.Y.2d at 446, 209 N.Y.S.2d at 300, 171 N.E.2d 443. The *Ripley* plaintiffs did not seek a judgment for the loss of the traffic of independents. While they did request judgment in excess of $8,000,000 for unfair divisions on export traffic, the Referee declined to grant any, evidently considering that the proof showed only that IRCA had been forced to reduce its own rates to meet truck competition.

To support its position that the action in the New York courts, which lack pow-

14. Although the District Court's judgment dismissed so much of the third and fifth claims as related to matters occurring before February 16, 1961, "on the ground of *res judicata*," this direction as to the fifth does not accord with the language or theory of the opinion, see 254 F.Supp. at 239.

15. Plaintiff also argues that when the *Ripley* action was brought in 1949, we had not yet decided Fanchon & Marco, supra, 202 F.2d 731, 36 A.L.R.2d 1336, holding that derivative actions for violations of the antitrust laws would lie, but we do not consider that point to have substance.

16. At the instance of counsel for UF, the Referee sustained objections to arguments and evidence which were relevant only to antitrust violations and not to breaches of fiduciary duty.

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er to grant relief under the antitrust laws, could not preclude a later federal treble damage suit, plaintiff relies heavily on Judge L. Hand's well-known holding, in Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2 Cir.), cert. denied, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955), that a state court's overruling of an antitrust defense would not bar a federal suit for treble damages brought by the state court defendant. Defendant distinguishes this, as did the district judge, 254 F.Supp. at 237-238, on the basis that there it was the antitrust defendant, not the antitrust plaintiff, who invoked the state forum. Defendant further asserts that, whatever may be thought of plaintiff's distinction of *Williamson* and the other cases cited above, this cannot explain away our old decision in Straus v. American Publishers' Ass'n, 201 F. 306 (2 Cir.1912), appeal dismissed, 235 U.S. 716, 35 S.Ct. 197, 59 L.Ed. 438 (1914). Straus had first sued in a New York court under the state and federal antitrust laws for an injunction and damages with respect to an agreement to fix prices of books, and the Court of Appeals had held the agreement valid as to copyrighted although not as to uncopyrighted works. While Straus' appeal to the Supreme Court was pending, he sued in the district court under the federal antitrust act alone. This court held the state judgment conclusive, the opinion saying in one breath that the state court was without jurisdiction of the complaint founded on the federal statute and in the next that the "question was actually involved in the cause before the state court, which was competent to decide it." The Supreme Court later reversed the New York judgment on the merits, 231 U.S. 222, 34 S.Ct. 84, 58 L.Ed. 192 (1913), making a remark equally hard for modern ears to understand: "This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts, seeking an injunction, and to recover damages under the Sherman Law." 231 U.S. at 237, 34 S.Ct. at 88.

The *Straus* case is not directly in point since it held the federal plaintiff barred not by failure to assert a federal claim in the state court but by the state judgment against him upon it. Even as to that, however, Judge L. Hand overruled *Straus* in denying a petition for rehearing in *Lyons*, supra, 222 F.2d at 195. We think it was well overruled even though, as defendant urges, it perhaps did not need to be in order to support the *Lyons* result.

[3] Since what *Lyons* said in overruling *Straus* would necessarily mean that a judgment in favor of a state court defendant in an action seeking relief under the federal antitrust laws would not bar a subsequent federal suit,[17] it does seem hard to understand how a plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for antitrust relief can have a larger effect. Compare Restatement, Judgments, § 62, Comment on Clause (a), p. 255.[18] We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from

17. We do not deal here with a case where the jurisdiction of the state court was challenged and upheld by it, albeit erroneously. See Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939); Alleghany Corp. v. Kirby, 340 F.2d 311, 312, n. 1 (2 Cir.), cert. granted, Holt v. Alleghany Corp., 381 U.S. 933, 85 S.Ct. 1772, 14 L.Ed.2d 698 (1965), dismissed, 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335 (1966).

18. Section 62k of the Restatement suggests that where the plaintiff sues in a court whose sovereign cannot or has not made available a court which can afford the plaintiff relief for his entire cause of action, there is no bar to a subsequent suit on the unredressed portion of that cause of action in the court of another sovereign which does afford such relief. This seems much closer to the case at bar than the rule of § 63, relied on by the district judge, 254 F.Supp. at 238, which deals with a prior suit brought in a court of limited jurisdiction where the sovereign has made available another court with jurisdiction to grant all the relief sought.

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that in which the issue was considered by the district judge. "On the whole, the principle against splitting is a salutary doctrine" but "inflexibly applied there can be little doubt that it results at times in unwarranted hardship." 1B Moore, Federal Practice ¶ 0.410[2] at 1169 (2d ed. 1965). It surely was not incumbent on the stockholders who brought the *Ripley* action in 1949 to recover all damages ITCA might sustain until the end of time from acts of UF of the sort there attacked, even those incurred after the period, through 1960, as to which proof of damages was made. Indeed, if the prior judgment had been in a federal treble damage suit by the corporation, it would not preclude recovery for subsequent antitrust violations. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). The complaint should therefore not have been dismissed as to claims within the appropriate period of limitations.

IV.

Plaintiff's appeal from the denial of its motion for partial summary judgment is without merit. Since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws, the judgment cannot have adjudicated that UF violated them; on this point the overruling of Straus, supra, 201 F. 306, by Lyons, supra, 222 F.2d 184, works for the defendant. The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that. See Restatement, Judgments, §§ 68 and 71, and Lyons, supra, 222 F.2d at 195-196. With this action limited to damages after February 16, 1961, save on the contract claim which plaintiff does not contend to have been considered in *Ripley*, the role of the findings and judgment in the prior action is even more limited.

The judgment is affirmed insofar as it barred claims for damages under the antitrust laws accruing before February 16, 1961, is reversed insofar as it went beyond this, and is affirmed insofar as it denied plaintiff's motion for partial summary judgment. No costs.

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THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. District Court
FILED 2/14/72
S.D. of New York

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

v.

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

---

72 Civ. Action No. 604

COMPLAINT

Plaintiff, through its attorneys, complaining of the defendant, alleges as follows:

1. Plaintiff, INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, is a corporation organized and existing under the laws of the State of New Jersey, having its principal place of business in New Jersey, and defendant, COMPANIA AGRICOLA DE GUATEMALA, is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in Boston, Massachusetts. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Plaintiff operated a railroad in Guatemala until January 1969 and operates a railroad in El Salvador in Central America. At the times hereinafter mentioned, the defendant was in the business of growing and producing bananas in Guatemala (particularly in the area of Tiquisate, located on the Pacific side of Guatemala) and for the exportation thereof to the United States.

3. On or about May 13th, 1948, plaintiff and defendant entered into series of agreements to endure for a period of approximately twenty years, expiring December 31, 1967. Pursuant to these agreements, defendant was required to ship all bananas grown or produced by it in the Tiquisate area of Guatemala destined for Puerto Barrios on the Atlantic side of Guatemala and thence for export to the United States, via plaintiff's railroad, pursuant to the terms as held by the New York courts (Ripley, et al. v. International Railways of Central America and United Fruit Company, 8 A.D.2d 310, aff'd 8 N.Y.2d 430) in good faith for defendant to maintain such shipments at least at the 1948 level; and plaintiff was required to furnish said transportation.

4. In the years subsequent to 1948, defendant breached the said contracts (a) by making shipments substantially below the 1948 level, and (b) by ceasing all shipments of bananas in or about August 1964.

5. Defendant shipped carloads of bananas via plaintiff's railroad from the Tiquisate area to Puerto Barrios, for export largely to the United States, as follows:

Year	No. of Carloads
1948	25,632
1949	14,593
1950	21,301
1951	12,440
1952	4,534
1953	16,079
1954	14,710
1955	12,988
1956	14,191
1957	14,435
1958	13,230
1959	13,799
1960	17,559
1961	13,693
1962	7,305
1963	9,177
1964 (through May 31st)	6,270

6. During the period 1961 through 1964, defendant proceeded to and did dispose, by sale, lease and otherwise, of substantially all its plantations in the Tiquisate area for cotton planting and other purposes except banana production, and deliberately avoided the possibility that said plantations would be acquired by others for continuation of the production of bananas for export to the United States.

7. Defendant is a wholly owned subsidiary of United Fruit Company, now called United Brands Company. During the period above referred to, when defendant was curtailing and ceasing its said shipments over plaintiff's railroad, United Fruit Company was increasing its production and purchase of bananas in areas other than the Pacific side of Guatemala for importation into the United States.

8. Plaintiff performed all the obligations under said agreements on its part to be performed.

9. The breaches of contract aforesaid by defendant have damaged plaintiff in an amount estimated to be in excess of $19,000,000.00 plus special and extraordinary damages in an amount not now known to plaintiff, in that, among other things, plaintiff lacked funds to discharge severance payment obligations on any attempt to lay off a substantial number of employees to compensate for the loss of defendant's substantial traffic emanating from Tiquisate, Guatemala, which resulted in heavy operating losses, subjected plaintiff to extraordinary expenses in endeavoring to survive as a going railroad in Guatemala, and also caused a loss of traffic to competing truckers.

10. An action brought by plaintiff against United Fruit Company is now pending in the United States District Court

for the Southern District of New York (Docket No. 65 Civ. 479), wherein plaintiff alleges claims against United Fruit Company for violations of the antitrust laws of the United States and, under the doctrine of pendent jurisdiction, a claim for United Fruit Company's breaches of the agreements aforesaid through its instrumentality, COMPANIA AGRICOLA DE GUATEMALA, the defendant herein.

11. Said action includes, inter alia, the transactions which are the subject of the instant complaint. Issue has been joined in said action, and pretrial discovery procedures are now in progress.

12. In the said action, it is plaintiff's position that United Fruit Company is responsible for the breaches of contracts alleged in the instant complaint, both because United Fruit Company had and exercised pervasive control over COMPANIA AGRICOLA DE GUATEMALA, and because United Fruit Company dictated said breaches of contracts.

WHEREFORE, plaintiff demands judgment against the defendant for such sum as shall be found due plaintiff from defendant on account of the above breaches of contracts, limited, however, to the period commencing October 9, 1962, with interest, and costs, and for such other, further and general relief as may be just.

LEVENTRITT LEWITTES & BENDER

By _____
Sidney Bender

Attorneys for Plaintiff
135 East 42nd Street
New York, New York 10017

Tel. (212) 986-4080

21A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed 2/14/72

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,	:	72 Civ.
Plaintiff,	:	
- against -		ANSWER
COMPANIA AGRICOLA DE GUATEMALA,	:	
Defendant.	:	

Defendant, Compania Agricola de Guatemala, by its attorneys, Kaye, Scholer, Fierman, Hays & Handler, for its answer to the complaint:

1. Denies paragraph 2 except it admits that plaintiff operates a railroad in El Salvador in Central America and operated a railroad in Guatemala, but states that it is without knowledge or information thereof sufficient to form a belief as to the date plaintiff ceased operating a railroad in Guatemala, and admits that defendant until 1964 was in the business of growing and producing bananas in the area of Tiquisate, on the Pacific side of Guatemala, for export.

2. Denies paragraph 3 except it admits that about May 18, 1948 plaintiff and defendant entered into certain written agreements contemplating the shipment of bananas for export by defendant over plaintiff's railroad under which defendant's obligation to ship expired January 1, 1963. Defendant refers to said written agreements for their exact terms and conditions.

3. Denies paragraphs 4, 8 and 9.

4. Denies paragraph 6 except it admits that during the period 1961-64 defendant disposed by sale or lease of substantially all its plantations in the Tiquisate area.

5. Denies paragraph 7 except it admits that defendant is a wholly-owned subsidiary of United Brands Company and that United Fruit Company and its subsidiaries, including the defendant, from time to time during the period referred to in paragraphs 6 and 7 of the complaint increased and decreased their production and purchase of bananas in various countries for importation into the United States.

6. Denies paragraph 10 except it admits that the action therein mentioned is now pending in the United States District Court for the Southern District of New York and refers to the pleadings and decisions in said action (254 F. Supp. 233 and 373 F.2d 408) for a description of said action.

7. Denies paragraph 12 except states that it is without knowledge or information sufficient to form a belief as to plaintiff's "position".

WHEREFORE defendant prays for judgment dismissing this action together with its costs and disbursements.

By its attorneys,

David Klingsberg

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
PLaza 9-8400

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff, - against - UNITED BRANDS COMPANY, Defendant.	:	65 Civ. 479-MIG
INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff, - against - COMPANIA AGRICOLA DE GUATEMALA, Defendant.	:	72 Civ. 649-MIG

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of John J. Ryan, Jr., sworn to the sixth day of July, 1972, and Exhibit A thereto, and upon the pleadings and all prior proceedings herein, and upon the documents submitted to the Court with this motion, the undersigned will move this Court before Hon. Murray I. Gurfein, in Room 2904 of the Courthouse, Foley Square, New York, New York, on August 18, 1972, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to F.R. Civ. P.

56 granting summary judgment dismissing the amended complaint in the first above-captioned action and the complaint in the second above-captioned action, and for such other and further relief as to the Court shall seem just and proper.

Dated: New York, New York
July 7, 1972

Yours, etc.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By _____

A Member of the Firm
Attorneys for Defendants
425 Park Avenue
New York, New York 10022
(212)-PL 9-8400

TO: LEVENTRITT LEWITTES & BENDER
Attorneys for Plaintiff
135 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff, - against - UNITED BRANDS COMPANY, Defendant.	65 Civ. 479-MIG
INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff, - against - COMPANIA AGRICOLA DE GUATEMALA, Defendant.	72 Civ. 649-MIG

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN J. RYAN, JR., being duly sworn, deposes and says:

1. I am Senior Counsel of defendant United Brands Company. I have been a member of the Law Department of United Brands and its predecessor, United Fruit Company ("United"), since March 1946, and I have been actively engaged in assisting retained counsel in the defense of the above-captioned actions since their

inception. I am fully familiar with all the facts stated herein. In particular, I am familiar with the Ripley litigation, described below, and with United's business. I submit this affidavit in support of defendants' motion pursuant to F. R. Civ. P. 56 for summary judgment dismissing these actions.

2. Plaintiff International Railways of Central America ("IRCA") was engaged in the business of operating a rail system in Guatemala, until its assets in that country were taken over by the government of Guatemala at the beginning of 1969 (Yaeger deposition in the United Brands action, pp. 42-43). IRCA's main line ran from Puerto Barrios on the Atlantic coast of Guatemala across the isthmus to the Pacific coast (e.g., Finding A16 in the Ripley case). In 1904, United acquired land from IRCA, and in 1913, United acquired land rights from a wholly-owned subsidiary of IRCA, Guatemala Central Railroad Company. This land was all on the Atlantic side of Guatemala. From 1936 until 1962, United Fruit Company owned 42.67% of IRCA's voting stock. By the beginning of 1962, United had sold all but 100 shares of its IRCA stock. IRCA does not compete and has never competed in the banana industry as such. It is not and never was an exporter or importer of bananas. IRCA's business was the hauling of bananas grown in Guatemala, and other products as well as passengers, from one location in that country to another. It also operated as a rail carrier in El Salvador. The destination of the bananas produced by United and CAG was the wharf at Puerto Barrios. Plaintiff was not involved with whatever may have transpired after the bananas left the wharf.

3. Defendant United Brands Company is the successor by merger of United, the original defendant in the United Brands action. United and its subsidiaries were engaged in the business of producing, purchasing, transporting and selling tropical products, especially bananas. The bananas were produced and purchased by United and its subsidiaries in Central America, northern South America and the Caribbean, and exported to the United States and other countries. United produced bananas in Guatemala at the Bananera plantation on the Atlantic side of the country and shipped them via IRCA to Puerto Barrios, pursuant to contracts with IRCA.

4. Defendant Compania Agricola de Guatemala ("CAG") was formed in 1927 as a wholly-owned subsidiary of United. CAG was engaged, from the early 1930's to 1964, in banana production on land it owned on the Pacific side of Guatemala in the area around the town of Tiquisate. Large quantities of bananas were produced by CAG after the development of its Tiquisate plantations in the 1930's. These bananas were shipped, pursuant to contract, about 300 miles via IRCA's lines to Puerto Barrios, as there was no deep water port on the Pacific coast.

5. In 1949 an action was brought in New York Supreme Court by stockholders of IRCA. That action, Ripley, et al. v. International Railways of Central America and United Fruit Company, is reported on appeal at 8 App. Div. 2d 310 and 8 N.Y. 2d 430. We are submitting to the Court with the motion papers the following papers from the record in the Ripley case: A copy of the Referee's Report and Decision and of his Supplemental Opinion, and a copy of the Record on Appeal to the New York Court of Appeals,

containing, inter alia, the Referee's Findings.

6. The Ripley case was a derivative action brought by minority stockholders in IRCA against United. IRCA was the nominal defendant. The Ripley plaintiffs were represented by the same attorneys, with associated counsel, who represent IRCA in the present litigation. The findings and decisions of the courts in the Ripley litigation, the arguments of the parties, and all proceedings therein are a matter of public record. To the extent they relate to the issues on this motion they are fully described in the accompanying memorandum.

7. The prior history of the present actions in this Court is also a matter of record and is also set forth in the accompanying memorandum. These two actions were consolidated on February 14, 1972, the same day the complaint against CAG was filed in this Court. A previous action by IRCA against CAG, asserting the same claim alleged in the complaint against CAG in this Court, was brought in the District of Massachusetts on October 9, 1968. That action was dismissed and the present CAG action commenced in order to have both the CAG and United Brands actions before the same Court.

8. The contracts alleged to have been breached in the fifth alleged claim in the amended complaint against United and the complaint against CAG, are those entered into in 1948 between CAG and IRCA. Copies of those contracts and all the other relevant contracts, as well as copies of agreements relied on by plaintiff, are included in the binder submitted as Exhibit A hereto. Each contract in Exhibit A has been given a "tab number" by which it is referred to herein and in the accompanying memorandum.

9. The parties' contractual relationships began in 1904 when United and IRCA entered into an agreement pertaining to the transportation of bananas in contemplation of United's banana development on the Atlantic side of Guatemala (Tab U-1). The 1904 contract, and a supplement thereto entered into in 1913 (Tab U-2), applied only to the transportation of bananas from United's plantations on the Atlantic side of Guatemala.

10. The first agreements applicable to the transportation of bananas from the Pacific coast of Guatemala were entered into between United and IRCA on February 3, 1933, which is about the time of the development of the Tiquisate plantations. With regard to the statement on pages 14-15 in the accompanying memorandum, referring to the supplemental agreement of 1933 (Tab U-4), that 8,000,000 stems was the equivalent of approximately 26,000 carloads of bananas, this fact is based on a conservative estimate of average loadings at about 300 stems per car. This estimate is confirmed by paragraph 8(d) of the main 1933 contract (Tab U-3), which recited that United would use its best efforts to obtain loadings of 300 stems per banana car destined to Puerto Barrios from the Pacific coast of Guatemala. (The precise number of carloads at 300 stems per car would be 26,666-2/3 in two years.)

11. In 1936, IRCA and CAG entered into a new series of agreements covering shipments from the Pacific coast of Guatemala. Another series of contracts entered into in 1948 between CAG and IRCA, which are those alleged by plaintiff to have been breached, followed the pattern of the 1936 agreements. Under one of these agreements CAG was obligated to ship its bananas via IRCA until 1963

(Tab A-2). Two other agreements (Tabs B-3 and C-3) gave CAG the right to use IRCA's tracks and operating facilities until 1968.

12. The contracts between the parties and figures showing the number of carloads of bananas shipped by CAG were considered by the courts in Ripley (e.g., Findings D1, B342 et seq., 156 et seq.). However, during the period 1949 to 1962, when that case was litigated, no claim was made by or on behalf of IRCA that CAG was obligated to ship at the peak 1948 level, or that the contracts were breached in this regard. I know of no evidence that prior to 1965, when IRCA filed its complaint against United in this action, IRCA ever asserted the interpretation of the contracts alleged here.

13. With regard to the second claim, defendants have fully complied with the Ripley judgment, and United has always paid the same line haul rates as others for its own shipments of imports.

John J. Ryan, Jr.

Sworn to before me
this sixth day
of July, 1972

Lawrence N. Weiss

Notary Public

LAWRENCE N. WEISS
NOTARY PUBLIC, State of New York
No. 31-4207610
Qualified in New York County
Commission Expires March 30, 1973

3/A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

- against -

UNITED BRANDS COMPANY,

Defendant.

65 Civ. 479-MIG

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

- against -

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

72 Civ. 649-MIG

DEFENDANTS' STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT

Defendants contend that there is no genuine issue to be tried as to the following:

1. Plaintiff International Railways of Central America ("IRCA") and the predecessor of defendant United Brands Company were parties to an action commenced in 1949 in the Supreme Court of the State of New York, County of New York, a court of competent jurisdiction, entitled Charles B. Ripley, et al. v. International Railways of Central America and United Fruit Company, reported on appeal at 8 App. Div. 2d 310, 8 N.Y.2d 430 (the "Ripley

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case") Copies of the following portions of the record in the Ripley case are being submitted to the Court with this motion: The Referee's Report and Decision and his Supplemental Opinion, and the Record on Appeal to the New York Court of Appeals, containing, inter alia, the Referee's findings.

2. Plaintiff was at all relevant times engaged solely in the business of transporting goods and passengers within Guatemala and El Salvador.

3. The contracts between the parties alleged to have been breached in plaintiff's fifth alleged claim in the first above-captioned action and in the complaint in the second above-captioned action, as well as other contracts between the parties, are those included in Exhibit A to the Affidavit of Mr. Ryan.

4. Defendant Compania Agricola de Guatemala fully complied with the obligation to ship its bananas exclusively via plaintiff's railroad, as distinguished from other means of transportation, through December 31, 1962.

5. Defendants have fully complied with the judgment in the Ripley case, and United has always paid the same line haul rates as others for its own shipments of imports.

Dated: New York, New York
July 7, 1972

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER

By _____
A Member of the Firm
Attorneys for Defendants
425 Park Avenue
New York, New York 10022

TO: LEVENTRITT LEWITTES & BENDER
Attorneys for Plaintiff

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ducing its banana production which was to be shipped over railroad for purpose of harming railroad and in allegedly restricting use of land for banana growing upon sales to others not only to thwart potential competition but also for purpose of harming railroad was not ripe for summary judgment and that termination date of contract between railroad and banana shipper's subsidiary providing that, "until January 1, 1963," subsidiary would use main lines of railroad to transport bananas was January 1, 1963 even though trackage rights agreement and operation of trains agreement executed at same time as main agreement had termination date of 1967 and railroad could not maintain action for breach of contract based upon conduct occurring after January 1, 1963.

Order accordingly.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff,

v.

UNITED BRANDS COMPANY, Defendant.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff,

v.

COMPANIA AGRICOLA de GUATEMALA, Defendant.

No. 65 Civ 479.

United States District Court, S. D. New York.

May 8, 1973.

Railroad brought action against successor in interest to banana shipper and successor's subsidiary for antitrust violations and for breach of contract. The District Court, Gurfein, J., held that question of whether railroad had standing to sue under antitrust law for conduct of banana shipper in allegedly re-

1. Monopolies ⇨28(1.6)

In determining whether plaintiff has standing to sue for treble damages under Sherman Act, trial judge must be guided by his sense of the policy considerations that have moved appellate courts rather than by a strict extension of logical analysis from decided cases. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

2. Federal Civil Procedure ⇨2517

In ruling on motion for summary judgment on ground that plaintiff has no standing, trial court must assume allegations to be true and motion to be directed solely to standing.

3. Federal Civil Procedure ⇨2484

Question of whether railroad had standing to sue successor in interest to banana shipper and its subsidiary for treble damages under antitrust laws based upon defendants' conduct in allegediy reducing banana production for purpose of harming railroad and in allegedly restricting use of land for banana growing upon sale to others not only to thwart potential competition but also for purpose of harming railroad was not ripe for summary judgment,

where all facts had not been presented. Clayton Act, §§ 4, 4B, 7, 15 U.S.C.A. §§ 15, 15b, 18; Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

4. Railroads ⇐139

Main agreement between railroad and banana shipper providing that "until January 1, 1963," shipper would use main lines of railroad to transport its bananas had termination date of January 1, 1963 and railroad could not maintain action for breach of agreement based on conduct which occurred after that date even though trackage rights agreement and operation of trains agreement executed by same parties on same date as main agreement had termination date of 1967. CPLR N.Y. 213, subd. 2.

5. Carriers ⇐63

Contract requiring banana shipper to ship its bananas over main lines of railroad did not impose obligation to ship bananas in volume not less than were shipped in first year of contract or in any substantial amount, but only required shipper to ship bananas exclusively via the railroad rather than by other means of transportation.

6. Courts ⇐359.1(1)

Where claim of breach of contract was before federal district court in action also involving antitrust claims on theory of pendent jurisdiction, state law was controlling with respect to applicability of collateral estoppel doctrine.

7. Judgment ⇐634

Under New York law, when party suing has been given full opportunity to litigate issue in prior proceeding, defense of collateral estoppel will be sustained with respect to that issue.

8. Judgment ⇐828(3.41)

In railroad's action against successor in interest to banana shipper and its subsidiary for antitrust violations and breach of contract to ship bananas over railroad, only claim of breach of contract for failure to ship bananas in volume, as distinguished from antitrust claim, that railroad could assert was claim involving years 1961 and 1962 against shipper where breach of contract claims could have been litigated in state court action which resulted in supplemental judgment covering period to December 31, 1960 and contract had termination date of January 1, 1963.

9. Limitation of Actions ⇐16(6)

Under applicable New York six-year statute of limitations, railroad, which brought antitrust and breach of contract action in federal district court in New York against banana shipper and shipper's subsidiary, could assert claim against the subsidiary for breach of contract only with respect to occurrences between October 9, 1962, and December 31, 1962, where action against subsidiary had originally been commenced in another district on October 9, 1968 and then consolidated with New York proceeding and contract had termination date of January 1, 1963. CPLR N.Y. 213, subd. 2.

10. Carriers ⇐192

Agreement of shipper to ship bananas exclusively via railroad constituted sufficient consideration for contract establishing freight rates for banana shipments.

11. Contracts ⇐53

Adequacy of consideration is not of judicial concern in determining validity of contract.

12. Contracts ⇐10(3)

Contract whereby banana shipper agreed to ship exclusively via railroad and not to build port in certain location and freight rates were established was not void for lack of mutuality as there was detriment to shipper.

13. Carriers ⇐63

Contract requiring shipment of bananas exclusively over railroad and establishing freight rates did not impliedly obligate shipper to ship certain volume of bananas over railroad.

14. Judgment ⇐828(3.49)

Even if fiduciary relationship between shipper and railroad made ade-

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quacy of consideration for contract, whereby bananas were to be shipped over railroad exclusively and freight rates were established, a justiciable matter, effect of breach of contract could not be relitigated in federal district court where that issue had already been disposed of in prior state court action.

15. Federal Civil Procedure ⇐2191

Question of whether banana shipper's alleged cessation of its business of growing bananas on certain plantations constituted a breach of contract whereby shipper had agreed to ship bananas over railroad was not matter for summary judgment under New York law.

Leventritt, Lewittes & Bender, New York City, for plaintiff.

Kaye, Scholer, Fierman, Hays & Handler, New York City, for defendants.

GURFEIN, District Judge.

This is an antitrust and contract action brought by International Railways of Central America (IRCA) against United Brands Company (UB), successor in interest to the United Fruit Co. (UF) and Compania Agricola de Guatemala (CAG), a subsidiary of UB.[1] The amended complaint alleges essentially (1) that as a consequence of a predominant influence of UF in the Guatemalan banana industry IRCA was deprived of revenues from the shipment of bananas by competitors of UF, who, but for the violations, would have shipped more bananas over the plaintiff's railroad; (2) that as a result of UF's virtual absolute control of IRCA, UF deterred the shipment over IRCA of bananas competitive to UF and CAG with a consequent loss of profits to IRCA; and (3) that in violation of a contract between UF and IRCA executed in 1948, UF deliberately, as a reprisal for IRCA's success against it in a New York State action, stopped growing bananas in Western Guatemala, with a concomitant loss to IRCA of profits which could have been realized from the shipment of bananas. In the aggregate, IRCA demands judgment in the sum of $169,000,000 trebled, or $507,000,000. As a result of Judge Friendly's opinion on the appeal relating to a prior motion in this case (see below), the amount of damages which IRCA can properly claim will be far less. UB has now moved for summary judgment on several grounds.

The background of the controversy is as follows. At the turn of the century one Minor C. Keith owned a controlling interest in UF. In 1904 Keith acquired control of the Guatemala Northern Railroad and a large tract of undeveloped jungle ceded to the Railroad by the Guatemalan Government. In order to raise funds for his Railroad investment he sold all but 10% of his interest in UF. IRCA transferred some 50,000 acres of unplanted jungle to UF which was to undertake to plant 5,000 acres of bananas over the next 4 to 5 years. IRCA obligated itself not to encourage directly or indirectly any competition to UF in Guatemala, and to give UF detailed reports on the movement by IRCA of bananas for any other shipper. These original arrangements between UF and IRCA were confined to banana growing and shipping in Eastern Guatemala. The only deepwater ports are located in Eastern Guatemala, the primary one being Puerto Barrios. The Pacific Coast of Guatemala has no natural deepwater ports.

All of UF's bananas destined for the United States and Europe were shipped via IRCA. During the 1920s UF conceived a plan to expand its banana plantations into Western Guatemala, and to increase its control over IRCA. In 1928, a syndicate which included UF, purchased Keith's interest in IRCA. UF with 71,000 shares of common stock, became the largest single stockholder. The stock purchased by the syndicate was placed in a voting trust under which

1. UF will at times be used to mean UB since UF is the historically relevant name.

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UF through a trust company as its agent, nominated two of the five trustees. From 1928 on UF exercised a dominating, though secret, influence in IRCA.[2]

As UF's interest in Western Guatemalan banana development increased, it sought further to consolidate its control over IRCA to insure favorable rates and service on its own products, and to prohibit the same favorable rates to its competitors' products. In 1936, CAG, UF's subsidiary which operated UF's Western Guatemalan banana plantations at Tiquisate acquired 185,000 shares of IRCA stock from IRCA at a low price and the voting trust was dissolved. In Judge Friendly's words, "from this time [1936] UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as 'special adviser' to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed." International Railways of Central America v. United Fruit Company, 373 F.2d 408, 410 (2 Cir. 1967).

In 1933, UF and IRCA entered into a contract whereby a freight rate was established for UF which amounted to only slightly more than half of what UF's competitors were required to pay. In 1936, the 1933 rates were reaffirmed with additional provisions added. It was this 1936 contract which provided for the purchase by CAG of the 185,000 shares of IRCA's unissued stock and 3% notes for $2,165,000 in cash. CAG also agreed to purchase ten new locomotives and 300 banana cars for use on IRCA tracks and agreed not to build a West Coast port so as to insure the movement of the produce from the newly opened Tiquisate banana lands over IRCA's rails to East Coast ports. Moreover, in this contract CAG agreed to use IRCA's lines to ship its bananas and import its supplies to Tiquisate.

In a separate agreement, trackage rights were granted CAG to operate its banana trains over IRCA's lines. In another separate agreement, IRCA undertook to operate CAG's trains and to maintain CAG's locomotives and rolling stock; and CAG was to reimburse IRCA for the costs incurred.

In a supplementary letter agreement, the parties added a provision for the adjustment of rates upon a change in price affecting the costs and charges of producing, acquiring, selling and transporting Guatemalan bananas. In the event the parties could not agree on such adjustments, an arbitration clause was provided.

In 1948 CAG and IRCA entered into new agreements. Essentially, the 1948 contracts simply reaffirmed the 1936 contracts and extended them. Modifications in the freight rates were also made. The "main" contract was extended until December 31, 1963 and the supplemental contracts (the trackage and operating agreements) were extended until December 31, 1967. Another supplementary letter agreement as to arbitration was executed in 1948.

SYNOPSIS OF PRIOR LITIGATION

In February 1949 certain shareholders of IRCA instituted a derivative suit against UF in the New York Supreme Court, following unsuccessful efforts to readjust UF–IRCA relations and rates. After extensive discovery a trial commenced in 1953 before Mr. Justice Hammer of the New York State Supreme Court. After Judge Hammer's retirement, the trial continued before him as Referee. In June 1957, Referee Hammer filed a long report and concluded that UF had breached its fiduciary duty to IRCA. He found that the plaintiffs had established that UF exercised such domination over IRCA that it was really bargaining with itself when the basic

2. UF sold its stock interest in IRCA in early 1962.

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1936 contracts were negotiated and executed, and that UF had used its control to obtain unduly low freight rates for itself and CAG. He awarded a judgment for over 4½ million dollars for the period before 1956, and ordered an increase in freight rates prospectively to the termination of the contracts. In March 1961 a supplemental judgment awarded IRCA close to 4 million dollars more representing the increased rates from January 1956 through December 1960.

The Appellate Division, First Department, affirmed the Referee's findings (Ripley v. International Railways of Central America, 8 A.D.2d 310, 188 N.Y.S.2d 62 (1959)). It agreed that the finding of domination and control by UF was abundantly supported by the evidence. It observed that "the existing relationship precluded any possibility of genuine arm's length bargaining between IRCA and UF." 8 A.D.2d at 317, 188 N.Y.S.2d at 72. The Appellate Division upheld the award of damages, as well as the determination fixing a fair rate for the future at $130 per banana car.

The Court of Appeals affirmed the Appellate Division, 8 N.Y.2d 430, 209 N.Y.S.2d 289, 171 N.E.2d 443 (1960). The Court of Appeals held that the rates were divisible from the rest of the contracts. Divisibility was essential to the decision, for without it, the Court would have been met with the principle that "where a fiduciary contracts with its cestui regarding the individual property rights of the fiduciary, the transaction may be rescinded where there has been overreaching, but the cestui cannot knowingly retain the benefits which it receives under such agreements and simultaneously repudiate its obligations thereunder." 8 N.Y.2d at 436-437, 209 N.Y.S.2d at 292, 171 N.E.2d at 445. The Court affirmed the Referee's Judgment which had upheld the continued validity of the 1948 contracts and which had awarded compensation for unjustifiably low past rates and had adjusted the rates upward for the future.

During the progress of the *Ripley* litigation, the United States filed a civil antitrust complaint against UF in the Eastern District of Louisiana. This action was terminated early in 1958 by a consent decree, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January 1962, UF sold substantially all such stock to the BSF Company which in turn sold the great bulk of it to Tran Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common.

Beginning in 1961 UF began to liquidate its banana plantations in Tiquisate through sale, lease and otherwise. By the end of 1964 no more bananas were being grown in Tiquisate. It is alleged that UF required purchasers and lessees not to plant bananas on its former Tiquisate holdings.

On February 16, 1965, apparently in response to UF's abandonment of banana production in Tiquisate, IRCA instituted the present action in the Southern District of New York. It employed the attorneys who had represented the *Ripley* plaintiffs. There were six claims in the complaint as follows:

1. Loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other banana shippers from using IRCA, 1928-61, $75,000,000. 2. Utilizing IRCA to facilitate UF's monopolistic designs by granting UF discriminatorily low rates, 1928-61, $55,000,000 less the principal paid on the State Court judgment (since withdrawn). 3. Restricting UF's own banana shipments over IRCA, 1949-64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000. 4. Monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from West Coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher rail revenues it could

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have obtained if there had been effective steamship competition, 1928–61, $15,000,000 (since withdrawn).[3] 5. Breach of contract to ship West Coast bananas (damages included in third claim). 6. Acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U.S.C. § 18 (damages equal to aggregate alleged in first four claims). See International Rys. of Central America v. United Fruit Co., 373 F.2d 408, 411 (2 Cir. 1967).

The defendant moved for summary judgment before Judge Ryan on the ground that the plaintiff was barred from prosecuting the antitrust counts of the complaint because it was attempting to split a cause of action and because the statute of limitations had run on the antitrust action. Judge Ryan determined "that the facts presented to the New York court in the *Ripley* case were substantially the same as those presented by this litigation." He dismissed pre-1961 *antitrust* claims against UF because of the rule against splitting a cause of action. 254 F.Supp. 233 (S.D. N.Y.1966). With respect to the statute of limitations issue, Judge Ryan found that at least since 1959 IRCA had had several independent directors who had the requisite knowledge to bring suit against UF for antitrust violations, and that at the very least the statute of limitations should not be tolled beyond the election of independent directors in 1959. Judge Ryan held, therefore, that any antitrust claim occurring before February 16, 1961 is barred by the four-year statute of limitations (15 U.S.C. § 15b). Summary judgment was consequently granted for the defendant on the first, second, fourth and sixth claims and so much of the fifth claim as was not based solely on an alleged breach of contract.

On appeal the Second Circuit, in an opinion by Judge Friendly, 373 F.2d 408, cert. denied, 387 U.S. 921, 87 S.Ct. 2031, 18 L.Ed.2d 975 (1967), rehearing denied, 389 U.S. 1059, 88 S.Ct. 757, 19 L.Ed.2d 861 (1968), affirmed Judge Ryan's decision so far as it barred claims for damages under the *antitrust laws* accruing before February 16, 1961. The Court of Appeals reversed Judge Ryan's determination, however, on the effect of splitting the causes of action. It held that "since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws [since the New York courts do not have jurisdiction to determine such issues], the judgment cannot have adjudicated that UF violated them . . . the utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that." 373 F.2d at 419. Since there was no motion for summary judgment on the contract claim, and the opinion of the Court of Appeals sheds no light on its status, see 373 F.2d at 417, 419, there is no law of the case on that status.

On October 9, 1968 IRCA commenced an action against CAG in the District of Massachusetts. The same claims were there asserted as in the UF action. In order to have both the CAG and UF actions (now UB) before the same Court, the Massachusetts action was dismissed and another one subsequently commenced in the Southern District of New York on February 14, 1972. It was consolidated on the same day with this action against UB.

The plaintiff has now consented to a dismissal of its second claim for damages predicated on its receipt of rates lower than prescribed in *Ripley*. Only four of the six claims survive today, i. e. claims 1, 3, 5 and 6. None of them extends to a period before February 16, 1961, except for the 5th claim insofar as it depends upon breach of contract, the claim not passed on by Judge Ryan.

3. On December 16, 1971 a stipulation dismissing the plaintiff's fourth claim with prejudice took effect.

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The present motion for summary judgment is twofold: (1) that the antitrust claims (Sherman Act §§ 1 and 2 and Clayton Act § 7) must be dismissed for lack of standing of the plaintiff to sue under the antitrust laws; and (2) that the contract claim must be dismissed upon the ground that there was neither an express nor an implied obligation to furnish any particular volume of banana traffic to IRCA from the West Coast of Guatemala.

I

THE ANTITRUST CLAIMS

The defendant agrees that, for purposes of the motion, the Court is to consider the allegations of the complaint as true. Nor does it contend that summary judgment would lie against these allegations as a matter of substantive antitrust law. Its point, and its only point, is that IRCA so clearly lacks standing to sue for what may be antitrust violations by UF that summary judgment must be granted.

The basic reason for IRCA's alleged lack of standing is that it was not a competitor of UF, that the antitrust violations of UF were directed against others, the independent banana producers of Guatemala rather than against IRCA, and that any harm which may have come to IRCA was of such an incidental nature that it gives rise to no claim for relief under the antitrust laws.

The defendant argues that even though § 4 of the Clayton Act provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States," the courts have put a gloss upon "by reason of" so that IRCA is without standing.

The defendant does not rely on Supreme Court decisions for there is a paucity of such authority on the standing question. It relies, heavily, however, on the purported rule of the Second Circuit denying standing to plaintiffs in certain cases of alleged antitrust violations.

In searching for the rule to be applied on a motion for summary judgment we must be mindful of the defendant's own stricture that "plaintiff's standing to sue under the antitrust laws cannot be determined in the abstract, disassociated from the nature of the alleged violation of law and the injury claimed to have been suffered as a result." (Deft.Reply Br. at 44). We must also consider, to a certain extent, that the Court of Appeals for this Circuit has already had this antitrust action before it and failed, in a long and careful opinion, to express even a hint of doubt that the plaintiff had standing to sue.[4]

The claims here involved, in Judge Friendly's words, seek "loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other banana shippers from using IRCA . . ." (373 F.2d at 411); and damages arising from "restricting UF's own banana shipments over IRCA, 1949–64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961 . . ." (*Id.*).

The defendant's paraphrase of these claims is "that the plaintiff railroad was allegedly injured because it did not obtain additional banana shipments *from competitors of the defendant* whose business was allegedly curtailed as a result of the claimed illegal acts; and that

4. Although it is not always persuasive that an appellate court *sub silentio* confirmed a rule that was not challenged, our own Court of Appeals has surely not thought such an assumption to be untenable. In Gottesman v. General Motors Corporation, 414 F.2d 956 (1969), Judge Feinberg noted in a case which the Supreme Court decided on a statute of limitations ground, Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965) that "although the issue was not discussed, the Court evinced no qualms about dealing with a section 7 money damage claim." 414 F.2d at 960. The analogy is close.

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this injury resulted from defendant's alleged monopolization of the banana market, *a market in which plaintiff was not engaged* . . . Plaintiff's alleged injury is remote and indirect." (Deft.Br. at 81; emphasis supplied).

The plaintiff's paraphrase of these claims is that "Pursuant to [that] unlawful coercion of IRCA by United ('UF'), United made threats to IRCA to suppress, and did suppress, its own traffic over IRCA and *foreclosed others from coming in and shipping over IRCA* —third claim; and United required IRCA to discriminate against, and thereby *United suppressed independent traffic* over IRCA, first claim" (Pltf.Br. at 41, emphasis supplied).

Neither side has cited a case involving a railroad dominated by a monopolist, the activities of which allegedly caused a loss of revenue to that railroad. And, of course, there was actual privity here. Only analogy can be our guide.

[1] Standing to sue for treble damages under the Sherman Act is not easy to classify. In tort law generally a formula so imprecise that it requires months of law school teaching to define its boundaries is often the only guide to liability and causation. In antitrust law definition is even more difficult because policy considerations are not necessarily an ingredient of logical analysis. A trial Judge must be guided by his sense of the policy considerations that have moved appellate courts rather than by a strict extension of logical analysis from the decided cases.

This Circuit has said that "those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover." Ryan, D.J. in Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678, 679 (2 Cir. 1955), cert. denied, 350 U.S. 936, 76 S.Ct. 301, 100 L.Ed. 818 (1956). In that case the plaintiff was a patentee who was not permitted to recover for antitrust violations committed against his exclusive licensee from whom he received royalties.

The patent licensor was thus added to the category of "shareholders and officers of corporations as well as creditors and landlords" who had no standing, 224 F.2d at 679, although the Court, at the same time, disclaimed any intention to categorize, stating that "no hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity." 224 F.2d at 680.

We were thus given a new category with a caveat. These categories were expanded over the years to embrace suppliers who were franchisors, Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (2 Cir. 1970), cert. denied, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971), and patent licensors, SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2 Cir. 1969), cert. denied, 395 U.S. 943, 89 S. Ct. 2014, 23 L.Ed.2d 461 (1969). A late word from the Court of Appeals reaffirms that a non-operating landlord of a motion picture theatre is still without standing. Calderone Enter. Corp. v. United Artists Theatre Circuit, 454 F. 2d 1292 (1971).

The Court in the *Calderone* case, *supra*, made the distinction between one who has suffered economic damage because of his "relationship with the target" who may not sue, and the "targets themselves" who may sue. The rifle range metaphor certainly excludes the shotgun, but does it always also exclude the rifleman who shoots in an arc aiming at more than one person?

The policy rationale recently expressed is that the damage to one who is not a target is usually much more speculative and difficult to prove, and that opening the flood-gates may result in "overkill" 454 F.2d at 1295. "[T]o have standing one must be an object of an antitrust conspiracy" (p. 1296, n. 2); and it is intimated that even a non-operating landlord may, in such circumstances, find standing (p. 1296, n. 3).

An interesting analogy is the Ninth Circuit decision in Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956) where the landlord complained that her tenant and motion picture distributors had conspired to destroy the value of the plaintiff's theatre by threatening to withhold first-run motion pictures from it unless the plaintiff agreed to reduce the fixed monthly rental. Judge Mansfield in the *Calderone* case, *supra*, agreed that "plaintiff there was thus a target of the alleged conspiracy," 454 F.2d at 1297, although a motion picture theatre landlord, as such, was not a proper plaintiff, at least in the Second Circuit.

Nor did our Court of Appeals accept the view of some commentators that it is completely at odds with the Ninth Circuit. On the contrary it cited, with apparent approval (as properly following the "target area" concept), Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9 Cir. 1967) and Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073, 1076 (9 Cir. 1970). See 454 F.2d at 1297, n. 5 (although *Mulvey* had refused to follow Fields Productions, Inc. v. United Artists Corp., 432 F.2d 1010 (2 Cir. 1970).

The defendant also adds as authority for its position the recent case of GAF v. Circle Floor Co., 463 F.2d 752 (2 Cir. 1972) which held that *antitrust* damages had not been shown by a target company in a takeover attempt. The target company plaintiff was a manufacturer of floor tile and the alleged predators were the controlling stockholders of a large buyer of floor tile, whose control of the target company would tend to interfere with the sales of its competitors. The actual damages claimed resulted largely from a refusal by the defendant to buy the plaintiff manufacturer's goods in alleged pursuance of the scheme to obtain control.

The true holding of the case was that the particular damages alleged did not arise from *antitrust* violations, "diminution in competition," 463 F.2d 757. "The anti-competitive acts alleged in the complaint have not lessened GAF's ability to compete, and GAF has not therefore alleged that it has suffered any antitrust damages." *Id.* It is my respectful view that GAF simply was not injured by any antitrust violation, rather than that its injury was incidental, indirect, remote, or outside the target area.[5] The true standing cases, on the other hand, are generally situations where the plaintiff has in fact been hurt. I must conclude that the *GAF* case, *supra*, adds little to resolve the issue of the standing of one who has been *hurt* by antitrust violations. It does suggest, however, that restrictions on the use of the Tiquisate land which was sold by the defendant to prevent the raising of bananas may be too remote to support a claim for treble damages, since the restrictions did not harm the competitive position of IRCA as such. If there were competitor truckers or steamships or other purveyors of transportation they were *all* potentially affected by the decrease in shipments.

On the other hand, I respectfully suggest that the Supreme Court may have taken a more liberal view than our own Circuit on the question of standing. Although Perma Mufflers v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968) was decided on the issue of whether a plaintiff in an antitrust suit could be barred because it was in *pari delicto*, the assumption was implicit that a dominated dealer who was prevented from dealing with others than the supplier-defendants had standing to sue. There the competitor of Midas, the culprit, was the one principally harmed rather than the distributor it-

5. "GAF alleges that the $730,000 in 'lost profits' was 'based upon the difference between that [the profits on] GAF's sales *to Circle Floor* normally would have been in' those years. GAF does not allege that it was unable to sell floor tile, only that it could not sell the 'normal' amount to Circle Floor; there is no factual allegation that GAF had been injured in its business due to a decrease in *total* sales." 463 F.2d at 759.

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self. Although five separate opinions were written, none suggests that the plaintiff did not have standing to sue, aside from the question of *in pari delicto*.

We may also consider Continental Company . Union Carbide, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). There the Court held that "the injury alleged to flow from a monopolist's elimination of one's independent suppliers [was not] so 'remote' as to justify refusing to let the damages issue go to the jury." 370 U.S. at 699-700, 82 S.Ct. at 1411. The entity destroyed was the independent supplier, but the injury to the ! ,er resulting from the illegal act was not so remote as to exclude standing. On the other hand, the plaintiff and the defendant were actual competitors.

Nor are the exclusive dealing cases, in which it has been held that a purchaser on whom an exclusive dealing contract is imposed is as much in the target area as competing sellers, entirely inapposite. See Bales v. Kansas City Star Co., 336 F.2d 439 (8 Cir. 1964); Lepore v. New York News, Inc., 346 F.Supp. 755 (S.D. N.Y.1972). One of the claims is that IRCA was not permitted to carry freight for UF's competitors at rates competitive to its own. Whether there were alternative modes of transportation and whether IRCA was directly injured remains to be seen.

There is no need to advert at this time to the plaintiff's claim of boycott except to note that the *Perma Mufflers* case confirmed also that a principal corporation and its own subsidiary can be co-conspirators in violating § 1 of the Sherman Act, 392 U.S. at 141-142, 88 S.Ct. 1981; and that the *Continental Company* case held it error to exclude proof by the plaintiff of "unilateral monopolization," 370 U.S. at 708-709, 82 S.Ct. 1404. On the other hand, the claim of boycott after January 1962 may fail entirely if the plaintiff cannot show that the restrictions on land use were more than incidental to damage suffered by IRCA, if it did suffer damage. There is apparently no claim that the defendants asked any growers specifically not to deal with IRCA, but the facts require development before the legal issue is sufficiently delineated.

If we approach the present question of standing by categorization, IRCA does not fall within any category of the excluded. It is not a stockholder, employee, franchisor, patent licensor or landlord. We should rather approach the question, however, by way of the judicially sanctioned metaphor.

To make the metaphor of a "target" meaningful, one must, of course, assume that there is also a person aiming at it. The very concept implies intent. And "intent" was early held to be an element of restraint of trade. See Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 75-77, 31 S.Ct. 502, 55 L.Ed. 619 (1910).

In the present case we are limited by the earlier ruling on the statute of limitations to a period following February 16, 1961. We need not consider, therefore, whether IRCA had "standing" to sue for damages accruing in the earlier period when UF dominated its very existence with the consequent antitrust effects. In that sense much of the discussion of standing is academic.

By February 16, 1961 the following had occurred to change the picture. The Court of Appeals of New York had affirmed the Referee's decision requiring UF to pay higher rates to IRCA for transportation of bananas—$130 a car, a rate equal to that charged its competitors. The United States had obtained the consent decree requiring UF to divest itself of its holdings in IRCA by 1966.

The gravamen of the present claim that survives the limitations defense is that UF then turned upon IRCA as reprisal for its insistence on the fulfillment of the *Ripley* judgment and aimed its antitrust violations at IRCA as a direct and prime target. It is said to have cut its banana production on the West Coast for the purpose of laying

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IRCA low, and to have restricted the use of its Tiquisate land for banana growing not only to thwart its potential competition but also for the avowed purpose of directly harming IRCA.

[2] It is in the light of these allegations that the question of whether summary judgment will lie must be answered, remembering that we are to assume the allegations as true and the motion as directed solely to standing.

I think it would not be wise to consider in the abstract whether restraints of trade directed at a target such as IRCA for unlawful purposes afford the alleged victim standing to sue for treble damages. The charge presupposes the specific intent of the defendant to cause injury to the plaintiff. Here nuances are subtle and inferences from alleged facts tentative until the facts are proved. Indeed, one of the reasons for Fed.R.Civ.P. 52(a) is the need for an appellate court to know the facts found upon which the inference was made.

[3] The results may differ, moreover, for the time periods possibly involved. If the theme is domination, the relevant period may be only from February 16, 1961 to January 1962 when the IRCA shares were sold by UF. Whether the plaintiff can show actionable antitrust damage after the domination ceased is another question. We must assume on this motion that until all the facts are in, we cannot determine whether policy based on precedent will support the standing of the plaintiff to sue. The matter is simply not ripe for summary judgment.

In short, I am convinced that I should not try to determine the *range* of fire under §§ 1 and 2 of the Sherman Act, without giving the plaintiff a chance to develop its thesis by evidence.

SECTION 7—CLAYTON ACT—THE SIXTH CLAIM

The defendant seeks dismissal of the sixth claim which alleges violations of Section 7 of the Clayton Act on two grounds: (1) that IRCA, at the time of the acquisition of its stock by UF, was not "engaged in commerce," i. e. foreign commerce of the United States; and (2) that the Second Circuit now holds that the same kind of standing is required in a Section 7 claim as in a Sherman Act claim, and that the plaintiff does not have such standing. GAF v. Circle Floor Co., *supra*, 463 F.2d 752.

I have given my reasons for denying summary judgment on the issue of standing. The same reasons apply to the Section 7 claim, although I do not rule out the possibility of a dismissal on trial.

Since summary judgment is not being granted on the Sherman Act claim in any event, I shall hold in abeyance the question of whether IRCA was "engaged in commerce," a novel question that can better be decided when all the facts are presented. *Cf.* United States v. Times Mirror Company, 274 F.Supp. 606 (C.D. Cal.1967), aff'd per curiam, 390 U.S. 712, 88 S.Ct. 1411, 20 L.Ed.2d 252 (1968).

II

THE CONTRACT CLAIM

The amended complaint seeks damages for alleged breach of contract by UF's subsidiary, CAG which operated banana plantations on the Pacific Coast of Guatemala. UF is charged with a breach "through CAG" [Compl. ¶ 71]. The claim is that "in the years subsequent to 1948, defendant breached said contracts (a) by making shipments substantially below the 1948 level, and (b) by ceasing all shipments of bananas in or about August 1964" [Compl. against CAG ¶ 4].

The plaintiff contends that the contracts required CAG to ship substantial quantities of bananas for the life of the contract which is said to run to December 31, 1967. The defendants contend that the only term of contract applicable ended on January 1, 1963, and that the defendants, moreover, had no duty to ship any quantities of bananas even during the term but were simply to use IRCA exclusively. Both sides seek sum-

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mary judgment on the issue. Neither side suggests that relevant parol evidence exists.

I have concluded that on the face of the writings the terminal date for the contract requiring CAG to ship bananas was January 1, 1963. For reasons that will appear I also hold that the plaintiff is barred from asserting a claim for any diminution of banana shipments by the defendants that occurred before December 31, 1960, on the principle of collateral estoppel (although the statute of limitations would have permitted suit against UF for six years before February 16, 1965 when this suit was commenced, or February 16, 1959).

The Contract Expiration of January 1, 1963

[4] This case is, in a sense, a continuation of the *Ripley* case in the State Court. Both sides agree that the findings in *Ripley* are binding upon the parties in this Court. They differ, naturally, on the scope and meaning of some findings. There is obviously also an overhanging question of collateral estoppel.

It seems easier to approach contract interpretation *de novo* and then to see whether the findings or the doctrines of res judicata or collateral estoppel support or defeat the result.

In 1936 there were three basic contracts between IRCA and CAG: (1) the main agreement; (2) the trackage rights agreement; and (3) the operation of trains agreement. All were executed on the same day, September 17, 1936. The main agreement (Tab A1) defined CAG's obligation to use IRCA's railway for the transportation of its bananas. The other two contracts related to CAG's rights to use IRCA's lines (Tab B1); (a) the right of CAG to use IRCA's tracks, and (b) the right to use IRCA's personnel and facilities to transport CAG's banana trains (Tab C1). There were also separate rate contracts. In 1948 there were three new contracts of a similar nature.

The 1936 main contract had provided for a term of 20 years, expiring on September 17, 1956. The other 1936 contracts had provided for a term of 25 years. This difference in termination date was repeated in the 1948 contracts. The main contract was for a term of 15 years expiring January 1, 1963, and the other two contracts were for a period of 20 years, expiring January 1, 1968. All three contracts were executed simultaneously on May 18, 1948 to be effective as of January 1, 1948.

The five year differential in the 1948 contracts is the same as the five year differential that had existed in the 1936 set of contracts. Thus, the difference in termination date can hardly be thought inadvertent. If reason for the differential is sought, it may lie in the premise that if CAG desired to avail itself of its termination of the duty to ship exclusively by IRCA on January 1, 1963, it, nevertheless, still had another five years in which it could use IRCA's tracks and personnel without the exclusive obligation to ship only by IRCA.

The main 1948 agreement provides (¶ 1) that "until January 1st, 1963, the Guatemala Company [CAG] will exercise its rights under existing contracts with the Government of Guatemala to build a port on the Pacific seaboard only at such time and in such manner as shall be agreed by the International Company [IRCA] and the Guatemala Company in their mutual interest and also that during the said period, the Guatemala Company [CAG] will use the main lines of the International Company [IRCA] to transport its bananas and to carry its imported materials and supplies under such arrangements as the parties hereto may agree upon from time to time."

The obligation of CAG is thus expressly limited to "during said period" i. e. "until January 1st, 1963." Moreover, the exclusivity of such use is not made dependent on particular rates or particular volume, but only "on such arrangements as the parties hereto may agree from time to time."

Significantly also the 1948 main agreement provides (¶ 7): "If for any

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reason the contract for trackage rights and the contract for operation of trains, both dated May 18, 1948, should terminate prior to January 1, 1963, this contract shall likewise terminate at the same time." The date January 1, 1963 must have been used because it was the terminal date of the contract. Suppose the contract for trackage rights which was to run to 1967 should terminate in 1965 for example. On the plaintiff's theory the main contract would still be in effect, but it would, nevertheless, not "likewise terminate," because it was later than 1963. It is logical to assume that the cut-off date for acceleration of termination of the main contract was fixed at January 1, 1963 only because that was understood to be the terminal date of the main contract. It is only on that theory that one can assume that a termination of the trackage agreement *after* January 1, 1963, should have no effect on the main contract.

The plaintiff argues that all the 1948 contracts must be read together and, if so read, constitute a requirements contract good until the end of 1967. Since if that were true there would have been no need to have two different terminal dates in the different contracts, the plaintiff interprets the consolidated contracts as meaning that CAG could only get off the hook in 1963 if it had in fact built a port on the Pacific seaboard. There is no warrant for this interpretation in the language used in the main contract which specifically limits CAG's obligation to ship via IRCA only to January 1, 1963. It is further refuted by the provision that termination of the trackage agreement *only before January 1, 1963* affects the main contract.

The conclusion that the obligation to ship exclusively by IRCA terminated on January 1, 1963 is supported, moreover, by the findings of Referee Hammer in the *Ripley* litigation:

Finding 265:

"Under the 1948 contracts, IRCA obtained the following advantages: . . . (f) An extension from 1956 *to 1963* of Agricola's [CAG] 1936 agreement not to build a Pacific port and to use IRCA's lines exclusively for the transportation of its bananas and imports." (emphasis supplied)

While the use of the period ending in 1963 as applying to CAG's obligation to ship exclusively may not have been a studied decision to choose 1963 rather than 1967 it also cannot be dismissed as inadvertent in view of the care shown by the Referee in making his exhaustive findings. It is a finding on the issue of how long the contract was to run, as bearing on the ultimate fairness of the rates.

Similarly, when the Referee referred to the fact that the new rates set by the Court would apply "until the termination *dates* of the present contracts" (Referee's Report and Decision, at 228; emphasis supplied), he can hardly be deemed to have believed that as the plaintiff now contends, there was only *one* termination date. And the judgment itself speaks of "dates provided therein for termination" (Record on App.Vol. 1, at 19).

The conclusion is fair that the Referee found that there was more than one termination date—1963 for the main contract and 1967 for the others.

IRCA itself, through its then counsel, referred to "the principal expiration date being 1963"; and construed the contracts so that they "obligated United to haul its Guatemala West Coast bananas *until 1963* over IRCA lines the considerable distance to the Atlantic Port of Puerto B..rios" (IRCA Br. to App. Div. 7/3/58, at 4–5; Ex. 7 on Lewittes Dep. in United Brands action; emphasis supplied).

IRCA counsel also wrote in a memorandum submitted on the *Ripley* judgment: "IRCA believes that it is highly advantageous for IRCA to have Agricola [CAG] bound by contract to ship its bananas by rail *until 1963*." (Ex. 2 Lewittes Dep. at 7–8; 12; emphasis supplied). And it must be remembered that it would have been to IRCA's be-

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nefit to contend that CAG's obligation to ship was good until 1967. The State Court judgment must have been intended to include the finding that the obligation was to last no longer than until 1963.

The Court of Appeals stated that "the judgment appealed from determines those contracts to be valid and binding except with respect to the freight rates" (8 N.Y.2d at 436, 209 N.Y.S.2d at 292, 171 N.E.2d at 445). Nothing has been cited from the several opinions of the *Ripley* courts that fairly tends to show a finding that CAG was under an obligation to ship through 1967.

Since the terminal date for breach of the main contract is held to be January 1, 1963, any actionable breach must have occurred before that date and within the applicable New York six-year statute of limitations. CPLR § 213(2).

The Interpretation of the Contract

[5] UF and CAG contend, moreover, that even during the term of the main contract there was no obligation upon them to ship bananas in a volume not less than were shipped in 1948, or in any substantial amount whatever. The defendants maintain that the only obligation was to ship bananas exclusively via IRCA rather than by other means of transportation including the building of a port on the Pacific Coast. There is no claim that the defendants shipped by any other means.

A study of the agreements leads to that view. There is certainly no express provision requiring the defendants to ship any specific quantity of bananas. On the contrary, the provision that [CAG] will use the main lines of [IRCA] to transport its bananas . . . "under such arrangements as the parties hereto may agree upon from time to time" (main agreement) rather negates any fixed obligation to maintain the volume of traffic at the 1948 level. I also find that the issue was determined adversely to the plaintiff and that it had a full and fair opportunity to litigate for the years before 1961 when the supplemental judgment was entered.

The Referee in *Ripley* found it to be an advantage to CAG that "(1) IRCA undertook to transport all bananas tendered by CAG for transportation to Puerto Barrios from Western Guatemala with no corresponding obligation on CAG to ship any given amount of bananas over IRCA at the rates specified in the contracts" (Finding D101).

In another finding he wrote: "No obligation was imposed on United [UF] to ship any such bananas." (Finding B360(d)). While this particular finding related specifically to the 1933 contract, he also found that "no substantial change was effected by the 1936 contracts with respect to the transportation of bananas by IRCA for CAG (Finding B374). And as we have seen, the changes in the 1948 contracts, except for an increase in rates, "were purely formal" (Finding B397).

[6] Thus, it appears that both the issue of the term of the main contract and the issue of whether CAG had an obligation to ship any particular volume were determined adversely to the plaintiff's contentions by the Referee in *Ripley*. The claim of breach of contract being here on the theory of pendent jurisdiction, the State law is controlling on the applicability of the collateral estoppel doctrine to a given set of circumstances. See Ritchie v. Landau, 475 F. 2d 151, 2 Cir., decided March 14, 1973 at 154, and cases cited.

[7] The New York courts apply the so-called "full and fair opportunity test" to the defense of collateral estoppel. See Schwartz v. Public Administrator, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969); Ritchie v. Landau, *supra*. And when the party suing had been given a full opportunity to litigate the issue in a prior proceeding the defense of collateral estoppel will be sustained. See Goldstein v. Doft, 236 F.Supp. 730 (S.D.N.Y.1964), aff'd, 353 F.2d 484 (2 Cir. 1965), cert. denied, 383 U.S. 960, 86 S. Ct. 1226, 16 L.Ed.2d 302 (1960); Israel

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v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956).

The supplemental judgment in the *Ripley* case covered the period to December 31, 1960. It is apparent, therefore, that any claim of breach of contract involving failure to ship bananas in volume as distinguished from the antitrust claim that arose before December 1960 could have been litigated in the State Court. Any claim of loss because of an allegedly insufficient volume was available as an item of damage.[6] That is true particularly in view of the claim that the contracts themselves were obtained through breach of the fiduciary relation.

[8, 9] I am compelled to conclude, therefore, that the only claim for breach of contract still open is a claim for the years 1961 and 1962 against UF; and against CAG it is limited to six years before the commencement of the action against it in Massachusetts on October 9, 1968.[7] Therefore, CAG would be responsible for damages for breach of contract from October 9, 1962 to December 31, 1962.

The plaintiff infers, on the other hand, that the finding of the Referee that rates should be fixed until the termination of the contract implies that CAG had an obligation to ship until such time. That conclusion does not follow. An anticipated practice of shipping is as much to be implied from the finding as a firm obligation to ship. In Judge Cardozo's phrase IRCA had the "advantage of economic opportunity." Walton Water Co. v. Village of Walton, 238 N.Y. 46, 50, 143 N.E. 786 (1924).

[10 13] The plaintiff argues that a correlative obligation to ship a substantial volume of bananas must be read into the contract, or it is without adequate consideration. The answer is that the agreement to ship exclusively via IRCA is a sufficient consideration. Adequacy of consideration is not of judicial concern in determining the validity of a contract. Mencher v. Weiss, 306 N.Y. 1, 8, 114 N.E.2d 177 (1953); Warner-Lambert Pharmaceutical Co. v. John J. Reynolds Inc., 178 F.Supp. 655, 666, aff'd, 280 F.2d 197 (2 Cir. 1960); Restatement of Contracts § 81. Nor can the main contract be void for lack of mutuality when there is detriment to CAG because it must ship exclusively via IRCA and not build a port.[8] Hamer v. Sidway, 124 N.Y. 538 (1891); Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388, 390 (8 Cir. 1968); Fontainbleau Hotel Corp. v. Crossman, 323 F.2d 937, 942 (5 Cir. 1963); 1 Williston, Contracts §§ 102A, 103F. This distinguishes cases like Wood v. Lucy, Lady Duff-Gordon, *supra*, and Berlin & Jones Co., Inc. v. Monroe Paper Box Co., 137 N.Y.S.2d 155, 156 where unless the implied obligation were found, the contracts would have been unenforceable for failure of consideration.

[14] If it is the fiduciary relation that makes *adequacy* of consideration a justiciable matter, the effect of such breach has already been disposed of in the State Court and may not be relitigated. Ritchie v. Landau, *supra*.

The plaintiff argues, finally that the defendants have committed a serious, in-

6. At no time after 1949 did the volume of banana traffic equal the 1948 volume.

7. By stipulation of the parties it is this date that is determinative of the statute of limitations.

8. The New York Court of Appeals, after holding the question of freight rates separable, held "the rest of the agreements supported by independent consideration." 8 N.Y.2d at 438, 209 N.Y.S.2d at 293, 171 N.E.2d at 446. The Referee had listed seven benefits to IRCA. While the agreement not to build a port on the West Coast was held to be a sham in *Ripley* the agreement to ship bananas exclusively via IRCA was itself a detriment to UF.

Even if the contract falls for lack of mutuality that is not enough reason to spell out an implied obligation of such a vague nature as the obligation to ship an unexpressed number of bananas. Not every contract that may fail for lack of consideration is revived by Wood v. Lucy, Lady Duff Gordon, *supra*. An important element must be whether it is likely that if the parties intended such obligation they would not have expressed it.

dependent breach of contract by terminating the business of growing bananas on the Tiquisate plantations.

Since CAG did not abandon the Tiquisate plantations until after the contract expired on December 31, 1962, cases like Wigand v. Bachman-Bechtel Brewing Co., 222 N.Y. 272, 118 N.E. 618 (1918) and 407 E. 61st St. Garage v. Savoy Fifth Avenue Corp., 23 N.Y.2d 275, 296 N.Y.S.2d 338, 244 N.E.2d 37 (1968) are not clearly in point. In each of those cases the defendant abandoned its entire business during the *existence* of the contract.

[15] Nevertheless, since the termination of the Tiquisate venture is alleged to have begun as early as 1961, some of its reduction of volume may have been equivalent to a cessation. Whether even cessation in the absence of a specific covenant to maintain the business would be actionable is, in New York, however, not a matter for summary judgment. See *Savoy Fifth, supra*. And I must follow the New York Court of Appeals. Accordingly, the alleged substantial termination of West Coast business before December 1962, if there was such substantial termination, should await the trial.

With respect to so much of the fifth claim as relates solely to an alleged breach of contract, partial summary judgment is granted dismissing the complaint insofar as it claims damages for breaches committed after December 31, 1962 and before January 1, 1961 against UB and after December 31, 1962 and before October 9, 1962 against CAG.

With respect to antitrust claims 1, 3, 5 (except insofar as the claim is based on breach of contract) and 6, partial summary judgment dismissing the claims for acts committed before February 16, 1961 has already been ordered by Judge Ryan, and affirmed. The motion for summary judgment dismissing these claims for lack of standing to sue is denied.

It is so ordered.

Copy 49A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

INTERNATIONAL RAILWAYS OF
CENTRAL AMERICA,

Plaintiff,

65 Civ. 479 MIG

-against-

UNITED BRANDS COMPANY,

Defendant.

- X

PRETRIAL ORDER
NO. 1

INTERNATIONAL RAILWAYS OF
CENTRAL AMERICA,

Plaintiff,

72 Civ. 649 MIG

-against-

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

- X

A pretrial conference having been held on October 2, 1973, and the parties having been heard, it is hereby

ORDERED that:

1. The date for the commencement of the trial of the action is hereby fixed as January 8, 1974. The first phase of the trial shall be limited to the issue of liability with the understanding that the final pretrial order will state with more specificity subheadings under

this issue of liability. Following the conclusio.. of the first phase of trial, the Court will enter a further order setting a date for trial and providing for discovery and other pretrial procedures relati.g to the second phase which shall deal with the amount of damages, assuming that liability is established.

2. No further discovery demands shall be made by way of document requests, interrogatories or notices to take depositions except that certain correspondence in the possession of the plaintiff which had previously been shown to former counsel for the defendants shall be inspected by defendants' present counsel and, further, that plaintiff shall have an opportunity to finish his inspection of documents hitherto commenced.

3. On or before November 1, 1973, the plaintiff shall move for an order to file an amended complaint accompanied with a memorandum of law in support thereof. The defendants shall reply to said motion on November 12, 1973, together with an accompanying memorandum of law. No further exchange of papers on the motion will be permitted except by the express permission of the Court.

4. The parties shall forthwith commence the designation and furnishing of the copies of the exhibits which it plans to use or offer at trial and a list of

witnesses indicating whether each witness will appear in person or whether his deposition testimony will be offered. This exchange shall continue with deliberate speed with a view to having the entire exchange completed by December 3, 1973. All exhibits shall be identified by number or letter and only those exhibits as to which either party may object on the ground of irrelevancy, incompetency or otherwise shall be marked accordingly and ultimately submitted to the Court for determination as to admissibility. All documents not so marked by the opposing party shall be deemed admissible in evidence. At trial, exhibits used and witnesses offered must have been previously designated in accordance with this order, unless the offering party demonstrates that it was unable in good faith to make the designation earlier or where the exhibit or witness is offered in rebuttal of specific testimony.

5. With respect to depositions, the plaintiff will furnish to the defendant the names only, together with such other description as may be necessary, such as office held, of the witnesses whose depositions it proposes to offer at the trial, by October 31, 1973. Both sides will then exchange marked depositions of those hitherto named by the plaintiff on December 3, 1973.

The depositions shall be marked in two colors of crayon, one for the plaintiff and one for the defendants. Arrows or other designations may be used to indicate those particular portions of depositions objected to by the other side which will be submitted to the Court for decision. Thereafter, the other party shall have a week within which to designate other portions either for the sake of completeness or because of the objections to admissibility that had been raised. The parties would then, within one week, make a further counter-designation with objections.

6. The plaintiff shall furnish to the defendants on November 14, 1973 a proposed version of the final pretrial order. The defendants shall furnish to the plaintiff a revised version of the final pretrial order by November 19, 1973. There shall be a Rule 16 conference with the Court on November 26, 1973, at 11:00 A.M., unless otherwise directed by the Court. It is anticipated that the final pretrial order will be signed by December 3, 1973.

7. Trial briefs will be filed after the signing of the final pretrial order in the following manner:

Plaintiff and defendants shall exchange trial briefs on December 17, 1973. These briefs are intended to be an amplification of the final pretrial order and shall devote themselves primarily to legal issues

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and shall specify the issues of law and fact to be tried. They shall contain citations of authority.

8. The parties agree that any evidence introduced on the trial of liability, whether oral, by deposition or documentary, which either party believes relevant on the issue of damages, if a trial of such issue eventuates, may be offered at such subsequent trial without any necessity of recalling the witness who testified or who authenticated the document.

U.S.D.J.

Dated: October 2, 1973
New York, New York

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

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65 Civil Action No.479 (MIC)

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

v.

UNITED BRANDS COMPANY,

Defendant.

AMENDED AND SUPPLEMENTAL COMPLAINT

For Damages and Other Relief for Violation of Anti-Trust Laws.

First Claim

I. Nature of Claim and Jurisdiction of Parties.

1. This is a civil action to recover damages resulting from the violation by defendant, as hereinafter alleged, of sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), Section 73 of the Wilson Tariff Act (15 U.S.C. §8), and Section 4 of the Clayton Act (15 U.S.C. §15).

2. This Court has jurisdiction by virtue of the provisions of Title 15 U.S.C.A. §§15, 26 and 22, and Title 28 U.S.C.A. §§1337 and 1391(c).

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II. Description of Parties

3. (a) The plaintiff, International Railways of Centrai America (herein called "IRCA"), is a New Jersey corporation with an office at 375 Park Avenue, Borough of Manhatan, City and State of New York. IRCA owns and operates the principal railroad system in Guatemala and El Salvador in Central America, not subject to the regulations, supervision or other jurisdiction of the Interstate Commerce Commission. Its railroads in Guatemala are the only ones which connect the principal parts of the country with each other and with the Atlantic and Pacific seacoasts. After the year 1936, the outstanding equity of IRCA consisted of 500,00 shares of common stock and 100,000 shares of $100 par value, cumulative preferred stock. With arrears of $7,975,000, the preferred stock's par value and arrears amount to $17,975,000. Up to the year 1963, the common and preferred stocks of IRCA were traded on the New York Stock Exchange, and are now traded over the counter.

(b) Defendant, United Fruit Company (herein called "United"), is a New Jersey corporation, which at all material times herein has maintained an office at Pier 3, North River, in the Borough of Manhattan, City and State of New York, from which it carried on the business of importing and selling bananas in interstate and foreign commerce. United has executive offices in Boston, Massachusetts and operates banana growing plantations in numerous countries, including Guatemala. United has or has had extensive banana plantations in Guatemala, some in the eastern part and others on the Pacific side around Tiquisate. Compania Agricola de Guatemala (herein called "CAG"), is a Delaware corporation; it is a wholly owned subsidiary of United Fruit Company and was the

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instrument of United for operating banana growing plantations in the Tiquisate area on the Pacific side of Guatemala. The common stock of United is traded on the New York Stock Exchange.

III. Commerce Involved: The Banana Import Trade of the United States

The trade and commerce involved in this action concerns the banana import trade of the United States, more particularly described as follows:

4. Bananas are not produced in the United States for commercial purposes. They are: (a) produced and transported in the American tropics, then (b) transported by water carriers to the United States, and finally (c) imported, sold and distributed in large quantities in the United States. The United States imported the following volumes of bananas:

Year	Number of Stems	Year	Number of Stems
1932	49,457,000	1947	60,105,000
1933	39,613,000	1948	59,213,000
1934	47,679,000	1949	54,650,000
1935	55,019,000	1950	51,208,000
1936	58,302,000	1951	49,205,000
1937	66,587,000	1952	50,060,000
1938	59,243,000	1953	50,544,000
1939	57,128,000	1954	47,961,000
1940	52,336,000	1955	47,015,000
1941	51,662,000	1956	46,229,000
1942	27,199,000	1957	47,736,000
1943	24,729,000	1958	48,771,000
1944	31,686,000	1959	54,214,000
1945	40,953,000	1960	56,985,000
1946	53,934,000	1961	54,339,000

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The annual imports of the earlier years, 1928 through 1931, were comparable in magnitude to the shipments in 1932.

5. Guatemala at all material times constituted an important source of banana supply for the United States market. For example, 16.78% of all stems of bananas imported into the United States in 1939 originated in Guatemala, and by weight the percentage was even higher. In the years 1945 to 1947, over 19% of all stems of bananas imported into the United States originated in Guatemala; by weight the percentage was even higher. United at all material times exported most or all of the bananas sent to the United States from Guatemala; the statistics, set forth in paragraphs "34", "36", and "57" below, are realleged.

6. IRCA was used as the means for transporting substantially all of the bananas from growing areas to seaboard for export from Guatemala to the United States. At all material times, IRCA has been the most suitable means of moving bananas from the growing areas of Guatemala to Puerto Barrios, the main Guatemalan point of export of bananas shipped to the United States.

7. The banana is a tropical, highly perishable, non-seasonal fruit which, because of its peculiar qualities, must be planted, grown, harvested and transported according to a coordinated schedule. To accomplish that coordination, United's operations have necessarily included the use of railroads, ports, steamships, communications, market distribution organization, and all of the necessary technical skills and professions. Bananas must be cut while green and unripe and transported in this condition by ventilated railroad cars and water carriers, refrigerated or ventilated, to ports of import within the United States

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and to distributing points therein. After the bananas are delivered to the wholesaler they are usually kept in a refrigerated ripening and processing room where the natural ripening of the fruit is controlled until it is ready for sale and delivery to the retailer.

8. The principal banana producing countries in the American tropics at material times have been Honduras, Ecuador, Costa Rica, Guatemala, Panama and Colombia. Other producing countries include Dominican Republic, Jamaica, Haiti, Mexico and Nicaragua.

9. United at all material times has been by far the largest importer of bananas into the United States. For example, in 1935, United imported 56% of the stems of bananas imported into the United States, and in 1953, the percentage was 57%. By weight, United's percentage of banana imports into the United States was 65%. In the period 1943 through 1955, United made an operating profit in excess of $985,000,000. In the period 1930-1954, United paid dividends in the amount of $450,000,000.

10. United's principal banana operations at material times have been (a) the ownership and leasing of banana growing lands and production of bananas in the American tropics; (b) the purchase of bananas in the American tropics, chiefly under agreements with independent banana planters to purchase their entire production; (c) the ownership and operation of various public utilities in the American tropics, including railroads, docks, wharves, sidings, and telegraph lines; and stock ownership in such public utilities and control thereof in connection with the transportation of bananas from farms and plantations to ports of export for transportation by water carriers to ports in the United States; (d) the ownership and opera-

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tion of an extensive shipping line of refrigerated vessels particularly adapted to the transportation of bananas from the American tropics to ports within the United States, and the chartering of refrigerated banana shipping space for long terms on independent shipping lines; and (e) the importation, distribution and sale of bananas in the United States, entering chiefly at New York, New York, New Orleans, Louisiana, Mobile, Alabama, Charleston, South Carolina, Baltimore, Maryland, San Francisco and Los Angeles, California, and Seattle, Washington.

IV. United Control and Domination Over IRCA From 1928 Through 1961

11. In a derivative action brought by a group of minority stockholders of IRCA, in its behalf, against United, the New York State Court of Appeals, 8 N. Y. 2d 430, affirmed the judgment of the Appellate Division, 8 A.D. 2d 310, (hereinafter termed the "State court action"), whereunder IRCA received cash benefits from United in excess of nine million dollars (principal and interest) plus other valuable benefits. The Court found that United controlled and dominated IRCA at least from 1928 and stood in a fiduciary relationship to IRCA in respect of business transactions between IRCA and United. Damages were awarded for insufficient freight rates charged United or CAG by IRCA for the transportation in Guatemala of bananas for export and of imported materials and supplies. Rates were also fixed on future shipments by United or CAG over IRCA. Defendant is estopped from challenging any of the specific material facts found in the State Court action. *Lyons* v. *Westinghouse*, 222 F. 2d 184 (C.A 2). Reference is made to all the decisions, findings of fact and conclusions of law made in said action, and excerpts therefrom are reproduced in the Appendix hereto.

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A. *Background: 1904-1928*

12. The banana industry in the United States dates from about 1870. By 1899, Minor C. Keith ("Keith"), and Boston Fruit Company were engaged in substantially all levels of the industry and had become the most wealthy, active and dominant members in the areas where each operated. United was organized in 1899 by Boston Fruit Company and Keith. Besides Keith, the important individuals were Andrew W. Preston and Bradley W. Palmer. United's primary purpose was to produce and acquire bananas in Latin America for sale in the United States and Europe. IRCA was incorporated in 1904 (under the name of "Guatemala Railway Company") at the instance of Minor C. Keith, Andrew W. Preston and Bradley W. Palmer as a United desired enterprise, in view of and as an aid to United's proposed banana development in Guatemala. The founders of IRCA intended it to act as the railroad carrier of United's Guatemalan bananas and as the medium through which United would acquire lands in Guatemala for the cultivation of such bananas.

13. Minor C. Keith at one time owned three fifths of the stock of United; he sold all but about 10% of the stock to invest in IRCA. In 1921, Keith sold his remaining shares in United. From 1904 to 1928, Keith's main business interest was in IRCA.

14. A contract between the two companies was proposed in 1904 prior to IRCA's actual incorporation, providing, *inter alia*, for the conveyance of land to United for banana development and for special privileges to United in the carriage of bananas by IRCA. By the agreement executed in 1904, United received from IRCA

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50,000 acres of the undeveloped jungle and undertook to plant approximately 5,000 acres of bananas within four or five years. The contract further recites that "the interests of the Railway Company require that the extensive planting and cultivation of bananas on the said tracts of land and elsewhere in Guatemala shall be *encouraged*, protected and regulated in order that this important branch of agriculture may be developed, thereby providing * * * business for the Railway Company * * *."

15. Since 1904, by its contracts with IRCA, United required IRCA:

(a) to discriminate against competitors of United by withholding the special facilities and services afforded United;

(b) to discriminate against competitors of United by charging rates for the transportation of bananas of such competitors very substantially in excess of those paid by United;

(c) not to encourage directly or indirectly any competition with United in Guatemala;

(d) to report in detail each month to United the quantity of all bananas shipped by others, the name of the shipper and the rate charged to such shipper.

16. During the period 1904 to 1924, United and IRCA had common major offices and directors. In the period 1924-1928, there were no common directors or officers.

17. Shipments of bananas over IRCA by United from plantations in eastern Guatemala had reached an amount in excess of 5,000,000 stems annually by 1928. Between 1926 and 1928, United became actively interested in the area of western Guatemala for banana development.

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18. By early 1928, Keith was in serious financial difficulty. The bankers for IRCA and Keith hoped to obtain control of IRCA via an acquisition of Keith's stock. United learned of the bankers' intention to take control of IRCA and took prompt steps to secure control for itself. United and the bankers purchased all of Keith's stock and placed the same in a 10 year voting trust. United then took actual control of the operations and operating management of IRCA. The voting trust was staffed by and run from the law office of Bradley W. Palmer, director, member of executive committee and counsel to United. United concealed its ownership of IRCA stock and its control over IRCA from the stockholders of IRCA.

B. ***Control and Domination 1928-1961***

19. Since 1928, one of the most important means through which United exercised practical control and domination over IRCA was to have its officer in charge of its tropical operations act as Special Advisor to the IRCA Board of Directors, to the Chairman of that Board and to the President of IRCA. His advice was uniformly followed.

20. In 1936, United acquired from IRCA 185,000 shares of common stock of IRCA, giving it 42.67% of the voting stock, and cementing control. United's stock constituted the majority of all shares actually voted at IRCA's annual meetings for the election of directors from 1938 through 1960. The stock ownership thus became insurance against changes in directors and also guaranteed a continuance of management satisfactory to United.

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21. The final judgment in the State Court action on the merits was entered in March 1961. The Appellate Division held the following:

> "While there was an attempt to give a verisimilitude of complete independence and separation between the companies, the realities presented a case of complete domination."

In affirming, the Court of Appeals held:

> "* * * We are satisfied that the findings are sustained that United was in practical control of IRCA at least after the creation of the voting trust in 1928, and stood in a fiduciary relationship to IRCA * * *"

22. United's dominant control over IRCA had not been disclosed to the public stockholders of IRCA. By its control and domination over, and preclusive contracts with IRCA, United disabled IRCA from taking practical measures to encourage independent banana traffic.

23. In January of 1962, United disposed of its stock interest in IRCA, except for 100 shares.

24. United had management control over IRCA since at least 1928 continuously to January 1962 and by virtue thereof IRCA acted, during that period, in the interests of United rather than for all its stockholders. Said control and domination between 1928 and 1961 was the instrument by which (a) United committed the hereinafter alleged offenses against the anti-trust laws, thereby victimizing and damaging IRCA and (b) United prevented IRCA from bringing suit against it for relief therefrom under the anti-trust laws, thereby tolling the Statute of Limitations. *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (C. A. 2).

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V. The Offenses Charged and Acts Done in Furtherance Thereof

25. Beginning in or about the year 1928 and continuing up through December 1961, the defendant United, CAG (after its incorporation), and other persons acting for each of them have contracted, combined and conspired in unreasonable restraint of, and have combined and conspired to monopolize, the interstate and foreign commerce of the United States with respect to bananas shipped or to be shipped to the United States from Guatemala, in violation of Sections 1 and 2 of the Sherman Act.

26. Beginning in or about the year 1928 and continuing up through December 1961, United was engaged in an attempt to monopolize and has monopolized the interstate and foreign commerce of the United States with respect to bananas shipped or to be shipped to the United States from Guatemala, in violation of Section 2 of the Sherman Act.

27. Beginning in or about the year 1928 and continuing up through December 1961, United, CAG (after its incorporation) and other persons acting for each of them, have agreed, contracted, combined and conspired, while United has been engaged in shipping bananas over IRCA in Guatemala for importation into the United States, with the intention and effect of restraining free competition in interstate and foreign commerce in bananas from Guatemala to, and increasing their market price in parts of, the United States, in violation of section 73 of the Wilson Tariff Act.

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28. Each act of the defendant, hereinafter alleged, was done in furtherance of the offenses charged in the three next preceding paragraphs and was a part thereof, and was done with the principal purpose of restraining and monopolizing the trade and commerce described above. It was the policy and intent of the defendant, formulated in Boston, New York City, and elsewhere in the United States and carried out by numerous acts performed in the United States, at all material times:

(a) That United would become the dominant source of supply of bananas from Guatemala to the U. S. market.

(b) That United would seize control over IRCA and its business and use such control for its own purposes with respect to the import of bananas into the United States.

(c) That United would use IRCA as an instrument to stifle competitors of United in said import trade.

(d) That shippers and potential shippers of bananas in Guatemala would be foreclosed from the trade and commerce hereinbefore alleged.

(e) That the opportunities of IRCA to transport bananas to ports in Guatemala for export to the U. S. would be greatly restricted for the advantage of United and to the injury of IRCA.

(f) That United would ship bananas from Guatemala and over IRCA for export to the United States only on condition that IRCA would not accept bananas from others for such shipment and export, except at rates and on conditions dictated by United.

(g) That United would require IRCA not to encourage competition to United with respect to the

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export of bananas from Guatemala to the United States.

(h) That United would obtain substantial profits for itself at the expense of IRCA, as a result of restrictions upon competition in the trade and commerce hereinbefore alleged.

(i) To suppress the development of competitive production and purchasing of bananas in Guatemala, for export to the United States.

(j) Through its control and domination over IRCA, to suppress competition in the business of importing bananas from Guatemala to the United States.

29. United has advised on and influenced the rates to be set by IRCA for the transportation of bananas for independent shippers since at least 1928, in order to assure the maintenance of a discriminatory rate in United's favor and thereby to suppress competition in the export of bananas to the United States.

30. In the period after 1932 and prior to March 23, 1939, United arranged, successfully with IRCA Presidents Myers and Armstrong, to ignore requests for the quotation of rates on export bananas and, at last resort, to quote only the maximum concession rates to prospective independent banana shippers, amounting to sums approximating $630. per car to Barrios, from western Guatemala.

For example: On March 27, 1935, an important independent requested rates from IRCA for moving export bananas from western Guatemala through Barrios. The IRCA President promptly requested a meeting with the Special Advisor from United. After that meeting, the

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IRCA President advised the IRCA traffic manager by letter:

> "Referring to the letter you have received from a man named M. Federico Aquino, dated Barrios, March 27th, in which you requested to quote rates on export bananas * * * to Barrios.
>
> "In accordance with my verbal instructions, you are to make no reply to this letter and are to handle with me personally any requests you may, at any time or in any way, receive from anyone, other than the Fruit Company, for either export or local tariffs on bananas * * *
>
> "As instructed verbally, please work out and bring me the maximum tariffs we could collect under our concessions on export bananas from all of our stations to Champerico, San Jose and Barrios separately." (The letter notes that a copy is being sent to Heyl of United.)

The reply of the IRCA traffic manager indicated the maximum tariff would amount to $700. per car plus wharfage on shipments from the west coast to Barrios. In that same letter, the IRCA traffic manager stated:

> "I acknowledge receipt of your memorandum of April 2nd and, in accordance with your instructions, the letter received from M. Federico Aquino, asking for rates on export bananas * * * will not be replied to."

Later the IRCA President, in a letter to the IRCA Board, stated:

> "A man named M. Federico Aquino, in letters dated Puerto Barrios March 27th and April 6th, requests us to quote tariffs on bananas * * *

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> "Unless the Fruit Company can squelch this * * * I doubt that we can indefinitely ignore these communications * * * [I]f * * * the Railway * * * must quote tariffs, we should quote the maximums * * * and face the music."

On March 23, 1939, the IRCA Board, on the basis of recommendations and advice of United's Special Adviser, approved a new rate of $130. per carload, plus wharfage and switching charges, for the transportation of export bananas from western Guatemala to Puerto Barrios for independents, the same to be handled on regular trains. For better service, United paid IRCA $60. per car.

31. Although IRCA is a common carrier, IRCA was required to follow United's advice and was required to refuse bananas offered for transportation by independent shippers.

32. Under United's domination:

(a) IRCA regularly informed United of inquiries and shipments by all persons seeking to move export bananas in Guatemala.

(b) Until 1946, IRCA refused to furnish independent shippers with its special banana cars for the transportation of their fruit, despite the ownership of 349 such cars by IRCA and despite the fact that such special cars were necessary to the proper transportation of bananas; such cars were always furnished to United and CAG.

(c) Shortly after the new independent rate was fixed in 1939, United arranged to have IRCA remove its ownership labels from IRCA's banana cars and to substitute the name of CAG, thereby giving the false appearance of United ownership

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and consequent unavailability to independents; all of IRCA's banana cars bore the CAG label until August, 1946.

(d) Until 1946, IRCA refused to furnish independent shippers extra train service for the transportation of their fruit, requiring them to move on ordinary trains despite the fact that special service was necessary to the proper transportation of bananas; such extra trains were always furnished to United and CAG.

(e) In 1944 a new government took office in Guatemala; with the end of World War II and the resumption of substantial ship movements to and from Guatemala, that government evidenced an active interest in the welfare of independent shippers of bananas. IRCA furnished the independent shippers with some banana cars and special train service in order to avert drastic government interference with United's operations; the CAG labels were removed from IRCA's own banana cars. Accordingly, a quota system was adopted by IRCA in the allocation of its own banana cars and locomotives, which provided first for the complete filling of all the transportation requirements of United and CAG and then the division of the remaining balance of available equipment, if any, among the independents.

(f) Because of United's requirements, in 1946 and thereafter, IRCA frequently did not furnish cars to independents or did not deliver all they ordered, resulting in substantial loss of fruit and other damages to the independents.

(g) IRCA refused to spot empty banana cars or pick up loaded banana cars on IRCA's sidings leading from IRCA's main line into the independent

plantations; IRCA has regularly spotted and picked up banana cars on the private rail tracks of United and CAG.

(h) IRCA refused to guarantee the regular service sought by independents, even when offered in return a guaranteed payment to IRCA regardless of whether the cars were used or not; IRCA was bound to United and CAG by contract to render them, and did render them, guaranteed service.

33. A summary of the United-imposed discriminatory IRCA rates on independent bananas for export from the Pacific side of Guatemala, via Barrios, to the United States, is as follows: During the period 1933-1935 at $150. per car; from 1935 to 1939 at $630. per car; from 1939 to 1961 at $130. per car plus a rate of $3 per ton for wharfage, plus a charge for loading aboard ship with the further addition after 1958 of a wage price and fuel oil differential. United, for better service and special facilities, paid $60. per car from 1933 to 1948, $75. per car from 1948 to 1951, $85. per car from 1951 to 1952, and $90. per car in 1952, and about $85. per car from 1953 to 1961 (exclusive of the payments made pursuant to the 1961 State Court judgment specified in paragraph "11" above). United paid no wharfage and no charge for loading aboard steamer. Beginning with 1948 and continuing through 1961, United prevented IRCA from making normal upward adjustments in the line haul charges to independents so as to avoid increasing the gap between the independent rate and the low discriminatory rate for CAG exacted by United on west coast bananas.

34. Independent shipments of bananas at said rates were as folows:

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Year	Number of Cars	Year	Number of Cars
1945	1,964	1954	2,947
1946	6,367	1955	2,692
1947	8,994	1956	2,344
1948	7,205	1957	3,643
1949	5,272	1958	3,405
1950	1,649	1959	4,665
1951	1,562	1960	6,908
1952	2,618	1961	4,384
1953	3,767		

There were no independent shipments prior to the year 1945; after the year 1961 the number of independent shipments was insignificant. Discriminatory practices were a substantial factor in causing many of the banana shippers to cease shipping.

35. On bananas grown on the eastern side of Guatemala and exported to the United States, commencing in 1913, United paid IRCA 11½¢ per stem while the rate to others was set at 20¢ per stem. In 1920, the rate charged United was raised to 15⅓¢ per stem. In 1930, shortly after United assumed control over IRCA, the rate was again reduced to 11½¢ for United, and between 1932-1947, fluctuated between 11½¢ and 12¢ per stem, depending on total volume of United and CAG shipments. From 1948 to 1961, that rate for United stayed at 11½¢ per stem, regardless of volume. Between 1943 and 1955, revenue on United shipments from eastern Guatemala averaged about $29. per carload. United paid no wharfage and no charge for loading aboard ship. (The aforesaid is exclusive of payments made pursuant to the 1961 State Court judgment specified in paragraph "11" above). During the period 1908 to 1954, inclusive, approximately 27

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percent of the bananas shipped over IRCA by United, and originating in eastern Guatemala, have been bananas purchased by United from farmers.

36. Since 1907, United's monopoly on east coast bananas in Guatemala has been substantially 100% effective. Following World War II, there were a few carload independent banana shipments from eastern Guatemala; they were charged at $72. per carload plus $3. per ton wharfage plus a charge for loading aboard ship.

37. Other United-imposed discriminatory practices of IRCA, in effect at all material times, were the following:

(a) United paid IRCA $60. per car, later $100. per car, for the transportation of imported materials and supplies shipped across Guatemala, whereas others paid about $250. for the same service; much of the imported materials and supplies were used on the banana farms.

(b) United paid wharfage charges on its imports of $1. per ton, later raised to $2. per ton; others paid $3. per ton.

(c) United had exclusive use of the north side of the IRCA-owned Barrios pier without charge and was permitted to erect conveyors thereon which are essential to an efficient banana loading operation; others were not permitted to erect conveyors on the Barrios pier.

(d) United was permitted to use its own employees to unload the bananas from the banana cars, while others were required to use IRCA at a charge of $3. per ton, on which IRCA made a substantial profit.

38. IRCA has been further injured in its business, with the effect of decreasing IRCA's profits and causing per-

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manent damage to its business and property, because of the identification of IRCA and United in the public mind resulting from United's control and domination over IRCA. United admitted to the Securities & Exchange Commission in 1941:

> "Such confusion of the two companies in the public mind would spell ruin for the railroad company in Guatemala, as it would prepare the way for demands for higher wages, lower freight and passenger rates, extension of lines, heavy judgments in damage cases, etc., because it would be considered that the United Fruit Company was the same as the Railway Company and could afford all these things."

VI. Effects of Offenses, Including Injury to IRCA's Business and Property

39. As a result of the violations of the anti-trust laws, hereinabove alleged, committed by United through exercise of control and domination over IRCA:

> (a) During the period 1928-1964, Guatemala, and IRCA, were restricted to supplying substantially less than 20% of all bananas imported into the United States, whereas, absent said violations, Guatemala, and IRCA, would have supplied about 40% of all bananas coming into the United States. (On December 21, 1926 a United official reported to the President of United that if the available area for bananas on the West Coast of Guatemala was as reported, there was a chance of "the banana market being swamped.") Guatemala's and IRCA's share of United States imports declined from the level of 15 to 20 percent of the banana imports of the United States for the period 1937 to 1948, to a level of about 7 percent for the period 1951 to 1961. (By contrast, Ecuador, a country free of

United's control over the supply of bananas, has increased its share of United States banana imports from less than 1% before 1946 to over 44% by 1962, despite the fact that the travel time from Ecuador to United States ports is about twice that from Barrios to United States ports.)

(b) To the detriment of United States consumers: (1) other persons have been excluded from engaging in the banana business; (2) United has acquired the power to fix prices at which bananas are sold in the United States; and (3) the benefits of competition in the banana industry have been curtailed.

(c) Substantial capital could not be attracted to Guatemalan banana business for long term investment since it could not be assured that it would receive treatment in transportation rates and service comparable to that afforded United.

(d) The natural and proximate consequence of anti-trust law violations of United hereinbefore alleged was, and will continue to be, to deter the shipment over IRCA to the United States of bananas competitive to United and CAG, which shipments would have been highly profitable to IRCA.

(e) As a result of the foregoing, IRCA has been injured in its business and property between February 16, 1961 and January 3, 1969, which latter date is the

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date of final dissipation of the effects of United's control over IRCA, as follows:

(i) Between February 16, 1961 and January 3, 1969 IRCA would have made $16,352,000 profits on the transport of bananas competitive to United and Agricola; such profits are computed by multiplying the total number of carloads reasonably expected to be transported for independents by the projected profit per carload which profit is $130 (the public tariff) less the estimated out-of-pocket costs per carload of carrying such traffic. In addition, a profit of $5,092,000. must be added for the profit to IRCA on wharfage; this profit was determined by utilizing a wharfage rate of $3.00 per ton or approximately $36.00 per car from which should be deducted the out-of-pocket costs for providing those services, estimated to be $15.00. The profit on wharfage per carload was multiplied by the total number of cars reasonably expected to be shipped by independents.

(ii) Permanent injury to IRCA's business and property inflicted by United - $20,000,000 which represents decreased value of IRCA's business and properties in Guatemala resulting from United's illegal acts.

(iii) Loss of the Guatemala Division when the same was seized by the Government of Guatemala in January 1969, attributable to United's monopoly and abandonment of the West Coast properties and its foreclosing others from utilizing

the same for the growing and shipment of bananas - $51,382,000, the book value of the assets of the Guatemala Division of IRCA as of December 31, 1968.

[Second Claim, inclusive of paragraphs 40 through 46, abandoned.]

Third Claim

I. Nature of Claim and Jurisdiction of Parties

47. Paragraphs "1" and "2" are realleged.

II. Description of Parties

48. Paragraph "3" is realleged.

III. Commerce Involved: The Banana Import Trade of the United States

49. Paragraphs "4" through "10" are realleged.

IV. United Control and Domination Over IRCA From 1928 to 1961

50. Paragraphs "11" through "24" are realleged.

V. The Offenses Charged and Acts Done in Furtherance Thereof

51. Beginning in about the year 1949 and continuing to date, defendant United, CAG, and other persons acting for each of them have

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(a) combined and conspired in unreasonable restraint of, and have combined and conspired to monopolize,

(b) attempted to monopolize and monopolized, and

(c) agreed, contracted, combined, and conspired, with the intention and effect of restraining and increasing prices in

the foreign commerce of the United States with respect to the import of bananas into the United States, in violation of sections 1 and 2 of the Sherman Act, and section 73 of the Wilson Tariff Act.

52. Each act of the defendant, hereinafter alleged, was done in furtherance of the offenses in the next preceding paragraph and was a part thereof, and was done with the principal purpose of restraining and monopolizing the trade and commerce described above. It was the policy and intent of the defendant, formulated in Boston, New York City, and elsewhere in the United States and carried out by numerous acts performed in the United States, at all material times, to accomplish the objectives set forth above in clauses (a) through (j) inclusive of paragraph "28".

52A. Paragraphs 29 through 38 are realleged.

53. In 1948 CAG and IRCA entered into agreements for a period of 20 years, expiring December 31, 1967. Pursuant to these agreements, CAG was required to ship all bananas grown by it in the Tiquisate area via IRCA to Puerto Barrios, on the Atlantic side of Guatemala and, pursuant to their terms as held by the New York courts in the action referred to in paragraph 11 above, in good faith to maintain such shipments at least at the 1948 level, and IRCA was required to furnish said transportation. The freight rate was fixed by the contracts at $75. per carload, was later increased to $85. per carload, then to $90. per carload, but subject to a sliding scale based on the cost of fuel oil.

54. In said State court action, a judgment was entered and affirmed by the Appellate Division and Court of Appeals, requiring United, as fiduciary of IRCA, to pay increased carload rates on such shipments for the period in and after January 1, 1946, and fixing said rates at $130. per carload during the period on and after January 1, 1958, to the end of the contract period, *viz.*, December 31, 1967.

55. Guatemala has no facilities on the Pacific side for large scale export of bananas and IRCA always has been and is the preferred means of transportation for the bananas produced on the western side and destined for export via the Atlantic side of Guatemala. Practically all the bananas produced in the Tiquisate area are intended for export via Puerto Barrios to various countries, including particularly the United States, such bananas being imported through Atlantic and Gulf Coast ports of the United States.

56. During the period 1961 through 1964, United proceeded to and did dispose, by sale, lease and otherwise, of substantially all its plantations in the Tiquisate area for cotton planting and other purposes, but refused to permit the plantations to be acquired by others for continuation of the production of bananas for export to the United States. For example, in a lease dated November 22, 1962 between CAG (Lessor) and Roberto Berger Lehnhoff and Joseph Franklin Hendricks Bell (Lessees), CAG required the lessees to use the lands for cotton exclusively and to use the land for other crops only with authorization from CAG.

57. CAG shipped carloads of bananas via IRCA from the Tiquisate area to Barrios, for export largely to the United States, as follows:

Year	No. of Carloads
1948	25,632
1949	14,593
1950	21,301
1951	12,440
1952	4,534
1953	16,079
1954	14,710
1955	12,988
1956	14,191
1957	14,435
1958	13,230
1959	13,799
1960	17,559
1961	13,693
1962	7,305
1963	9,177
1964 (through May 31st)	6,270

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VI. Effects of Offenses, Including Injury to IRCA's Business and Property

58. As a result of the violations of the anti-trust laws, hereinabove alleged, committed by United:

(a) The commerce and trade of the United States, in the import of bananas from Guatemala, has been restricted, as set forth in clause (a) of paragraph "39" hereinabove.

(b) "39(b)" is realleged.

(c) The natural and proximate consequence of the anti-trust violations of United hereinbefore alleged was, and will continue to be, to deter the shipment over IRCA of bananas, which shipments would have been highly profitable to IRCA.

(d) As a result of the foregoing, and the antitrust violations involved in the continuing effects of United's control beyond sale of its IRCA stock, IRCA has been injured in its business and property, as follows:

(i) Between February 16, 1961 and January 3, 1969 IRCA suffered a loss of profits in the amount of $16,352,000;

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said damages were calculated on the assumption that the direct transportation cost per banana car was approximately $65 (Defendant Haase Exhibit 22-B) and that the difference between that number and the tariff rate of $130 was IRCA's loss of profits per car. The difference of $65 was then multiplied by the railroad's capacity to move banana cars off the West Coast of Guatemala (36,000 cars per annum) (Haase Dep. p.134 of Feb. 1971) minus the actual cars moved in each of said years from the West Coast by CAG and Standard Fruit. In addition, a profit of $5,092,000 on wharfage which is the result of multiplying the number of cars per year that would have been shipped by independents minus the actual number of cars shipped times the profit on wharfage of $21.00 per car (finding of fact in Ripley D99) (also see Exhibit 19 for identification in this action dated July 24, 1961 from Tennyson to Yaeger, p.5).

(ii) Between February 16, 1961 and January 3, 1969 $7,454,000 which were the damages inflicted on IRCA by United's preventing the dieselization of the railroad - arrived at by taking the annual savings from dieselization for the period 1963 through 1968 and subtracting therefrom the interest on financing, the depreciation on new diesel locomotives, and the cost of

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diesel spare parts (see Haase Exhibit 11); for the period 1961 and 1962 plaintiff assumed that the net savings for that period based on plaintiff's Exhibit 11 would be $2,076,000.

(iii) Between February 16, 1961 and January 3, 1969 United inflicted damages on IRCA of $2,270,000, the cost incurred by IRCA in making severance payments to employees terminated because of United's restraint on and finally elimination of its West Coast banana traffic.

(iv) Between February 16, 1961 and January 3, 1969 the damage inflicted on IRCA by United arising from the loss of profit IRCA would have realized in carrying import traffic to the West Coast banana plantations; said damages are arrived at by estimating the number of cars that would have been carried times the average profit per car. Statistics furnished or to be furnished.

(v) Permanent injury to IRCA's business and property inflicted by United - $20,000,000 which represents decreased value of IRCA's business and properties in Guatemala resulting from United's illegal acts.

(vi) On January 3, 1969 the Government of Guatemala took the properties of IRCA in that country; United's violations were a substantial contributing

cause; for that loss of property IRCA claims $51,382,000, the book value of the Guatemala Division's assets as of December 31, 1968.

(vii) Between February 16, 1961 and January 3, 1969, there were damages inflicted on IRCA by United Fruit by reason of the fact that IRCA was required to maintain employees on its payroll who were not then needed and who could not be severed from IRCA's payroll because of IRCA's financial inability, caused by United, to make such severance payments as were required to terminate unneeded employees; the amount claimed to be stated.

[Fourth Claim, inclusive of paragraphs 59 through 70, abandoned.]

Fifth Claim

71. Damages are sought for United's breach of contract through CAG.

72. This Court has pendent jurisdiction by virtue of exclusive jurisdiction over the first, third and sixth claims. Wolfson v. Blumberg, 229 F.Supp. 191 (S.D.N.Y. 1964).

73. Paragraphs "3", "11" through "24(a)", and "51" through "57" are realleged, limited, however, as to the recovery of damages, to the period commencing six years before the commencement of the within action.

Sixth Claim

I. Nature of Claim and Jurisdiction of Parties

74. Damages are sought under section 4 of the Clayton Act (15 U.S.C. §15) by reason of United's violation of section 7 of the Clayton Act (15 U.S.C. §18). Julius M. Ames Co. v. Bostitch, Inc., U.S.D.C., So. Dist. N.Y., 62 Civ. 1, decided March 8, 1965, op #30,953.

75. Paragraph "2" is realleged.

II. Description of Parties

76. Paragraph "3" is realleged.

III. Commerce Involved: Banana and Import Trade and Commodity Export Trade of the United States

77. Paragraphs "4" through "10" are realleged.

78. At all material times, United and IRCA were engaged in commerce, within the meaning of section 7 of the Clayton Act (15 U.S.C. §18).

IV. United Control and Domination Over IRCA From 1928 Through 1961

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79. Paragraphs "11" through "24" are realleged.

V. The Offenses Charged

80. In 1928 and again in 1936 United directly or indirectly acquired stock of IRCA, where the effect of such acquisition or of the use of such stock, by the voting or granting of proxies or dominating IRCA, might be substantially to lessen competition or to tend to create a monopoly in the line of import and export commerce aforesaid.

81. As to such effect, paragraphs "28" through "38", "39(a)" through "39(d)," and "53" through "57" are realleged.

82. Such acquisition was in violation of section 7 of the Clayton Act (15 U.S.C. §18).

VI. Such Illegal Acquisition Damaged IRCA In Its Business and Property

83. As a result of the stock acquisitions in violation of section 7 of the Clayton Act hereinabove set forth, IRCA has been injured in its business and property as follows:
Paragraph 58(d) is realleged.

WHEREFORE, plaintiff demands judgment:

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(a) That defendant pay plaintiff the sum of $102,550,000, to be trebled.

(b) That defendant pay plaintiff the sum of $2,400,000 plus interest thereon.

(c) That plaintiff have such other, further and general relief as may be just, together with costs and a reasonable attorneys' fee.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff, -against- UNITED BRANDS COMPANY, Defendant.	Civil Action No. 65-479 (MIG) ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT.

Defendant United Brands Company, by its attorneys, Kaye, Scholer, Fierman, Hays & Handler, for its answer to the amended and supplemental complaint:

AS TO THE FIRST CLAIM

1. Answering par. 1 denies that it has committed any violation of law or caused damage to plaintiff.

2. Answering par. 3, (a) is without knowledge or information sufficient to form a belief as to the extent of arrears upon the preferred stock of plaintiff; (b) denies that the business of importing and selling bananas in interstate and foreign commerce was carried on from Pier 3, North River, in the Borough of Manhattan, and (c) denies that the banana-growing plantations referred to in par. 3(b) are in most instances owned or operated by defendant.

3. Denies par. 4 except it admits (a) that bananas are not produced in the United States for commercial purposes, (b) that the majority of bananas imported into the United States are produced and transported in the

American tropics, then transported by water carriers to the United States and imported, sold and distributed in the United States, and (c) that the annual importation figures set forth in par. 4 are approximately correct.

4. Denies par. 5 except it admits (a) that during the periods 1915-29 approximately and 1935-50 Guatemala constituted an important source of banana supply for the United States market, and (b) that the percentages alleged of Guatemala imports by stems are approximately correct and except that with respect to the statistics incorporated in par. 5 from pars. 34, 36 and 57 it refers to and realleges its answer to those paragraphs.

5. Denies the second sentence of par. 6.

6. Answering par. 7 denies that the natural ripening of the fruit can be controlled for more than a limited period.

7. Denies par. 8 except it admits that bananas are produced in the countries mentioned among others.

8. Answering par. 9 denies the first sentence thereof, and denies that its operating profit for the period 1943-55 exceeded $815,000,000.

9. Denies par. 10 except it admits (a) that United owns and leases banana-growing lands in the American tropics and produces bananas thereon; (b) that it purchases bananas both under contracts with planters for their entire production and under other production arrangements; (c) that it owns and operates in certain countries of the American tropics railroads, wharves, sidings and telegraph lines, many of which are public utilities; (d) that it owns and operates refrigerated vessels specially adapted to banana

carriage and has from time to time chartered additional refrigerated space on other lines; and (e) that it imports and sells bananas in the United States chiefly at the ports named in par. 10.

10. As to par. 11, refers to Ripley record, and states that the legal contentions asserted in this paragraph are questions of law which do not require responsive pleading.

11. Answering par. 12 denies that Minor C. Keith and Boston Fruit Company were engaged in substantially all levels of the industry or had become the most wealthy, active and dominant members in the areas where each operated.

12. Denies par. 14 except it admits the making of the contract of September 15, 1904, therein cited (Plaintiff's Exhibit 4 in the Ripley case) and refers to the same for a complete statement of its terms.

13. Denies par. 15 and refers to the contracts therein cited, all of which were plaintiff's exhibits in the Ripley case, for a complete statement of their terms.

14. Denies the first sentence of par. 16 except it admits that during the period 1904 to 1924 United and IRCA had some common officers and directors.

15. Denies par. 18 except it admits that by early 1928 Keith was in serious financial difficulties and that his stock in IRCA was deposited in a voting trust.

16. Denies par. 19 except it admits that from 1929 to September 1957 an official of United served at IRCA's request as Special Advisor to IRCA.

17. Denies par. 20 except it admits that in 1936 United acquired from IRCA 185,000 shares of common stock

of IRCA, giving it 42.67% of the voting stock, and that United's stock constituted the majority of all shares actually voted at IRCA's annual meetings for the election of directors from 1938 through 1960.

18. Denies pars. 22, 24-33 inclusive, 36, 37 and 39.

19. Denies par. 23 except it admits that by January 1962, United had disposed of its stock interest in IRCA, except for 100 shares.

20. Denies par. 34 except it is without knowledge or information sufficient to form a belief as to the amount and dates of independent banana shipments therein alleged.

21. Answering par. 35, denies that United assumed control over IRCA.

22. Denies par. 38 except it admits that United in 1941 submitted a letter to the Securities and Exchange Commission containing the language quoted.

[Second Claim, inclusive of paragraphs 40 through 46, abandoned.]

AS TO THE THIRD CLAIM

23. Answering pars. 47 through 50 inclusive, repeats each denial and denial of knowledge or information sufficient to form a belief as to pars. 1 and 3-24 inclusive.

24. Denies pars. 51, 52 and 58.

25. Answering par. 52A, repeats each denial and denial of knowledge or information sufficient to form a belief as to pars. 29-38 inclusive.

26. Denies par. 53 except it admits that in 1948 Compania Agricola de Guatemala ("Agricola") entered into

certain agreements with IRCA under which Agricola was required until December 31, 1962 (not December 31, 1967, as alleged) to ship all bananas grown by it in the Tiquisate area over the lines of IRCA to Puerto Barrios, and that the charges for such transportation were fixed at the figures stated.

27. Denies par. 54 except it admits that the judgment in the Ripley action decreed certain increases in the charges for shipments of bananas from the Tiquisate area, all as set forth in said judgment.

28. Denies par. 55, except it admits that Guatemala had no facilities on the Pacific side for large scale export of bananas and that the large majority of bananas produced in the Tiquisate area were intended for export via Puerto Barrios to the United States and/or elsewhere.

29. Denies par. 56 except it admits that during the period in or about 1962 to date Agricola disposed of substantially all of its plantations in the Tiquisate area.

[Fourth Claim, inclusive of paragraph 59 through 70, abandoned.]

AS TO THE FIFTH CLAIM

30. Denies pars. 71 and 72.

31. Answering par. 73, repeats each denial and denial of knowledge or information sufficient to form a belief as to pars. 3, 11 through 24(a) inclusive and 51 through 57 inclusive.

AS TO THE SIXTH CLAIM

32. Answering par. 74, denies that it has committed any violation of law or caused damage to plaintiff.

33. Answering par. 76 and 77, repeats each denial and denial of knowledge or information sufficient to form a belief as to pars. 3-10 inclusive.

34. Denies par. 78 except it admits that United was engaged in commerce within the meaning of Clayton Act §7.

35. Answering par. 79, repeats each denial and denial of knowledge or information sufficient to form a belief as to pars. 11-24 inclusive.

36. Denies par. 80 except it admits that in 1928 and 1936 it acquired stock of IRCA.

37. Answering par. 81, repeats each denial and denial of knowledge or information sufficient to form a belief as to pars. 28-38 inclusive, 39(a)-39(d) inclusive and 53-57 inclusive.

38. Denies pars. 82 and 83, and repeats its denial of par. 58.

FOR A FIRST DEFENSE

39. All claims in the amended complaint with respect to matters occurring before February 16, 1961 are barred by the Federal four-year statute of limitations, 15 USC §15(b), except so much of the fifth claim as constitutes a straight claim of breach of contract.

FOR A SECOND DEFENSE

40. All matters in the fifth claim occurring before February 16, 1959 are barred by the New York six-year statute of limitations, CPLR 213(2), except that any matters arising out of any alleged liability of defendant for any

breach of contract by Agricola, are limited to the period commencing October 9, 1962.

FOR A THIRD DEFENSE

41. In the action of Charles B. Ripley, et al., individually and as stockholders of International Railways of Central America, suing in behalf of themselves and for the benefit of said corporation and all other stockholders of said corporation, v. International Railways of Central America and United Fruit Company, in the Supreme Court of the State of New York, County of New York, Index No. 5955/49, being the action referred to in par. 12 and elsewhere in the present amended complaint, stockholders of International Railways of Central America (IRCA), the plaintiff herein, suing in its behalf, and represented by the same attorneys as now represent the plaintiff IRCA, upon the same claims (other than those portions of the third and fifth claims which relate to matters occurring after the year 1961) as those set forth in the present amended complaint, recovered a judgment against United upon said claims in the sum of $4,629,736.92 including interest, which judgment was filed in the Office of the Clerk of said Court on December 19, 1957. Said judgment was amended nunc pro tunc (amending the amount thereof to $4,531,055.38, including interest), by an order of said Court, filed January 2, 1958 and was subsequently modified, and, as modified, affirmed by the Appellate Division, First Department, of said Court. Said latter judgment was subsequently affirmed by the Court of Appeals of the State of New York. A supplemental judgment in said action in favor of IRCA against United upon the

same claims (other than the fifth claim) as those asserted in the present complaint was entered and filed in the Office of the Clerk of said Court on March 1, 1961 in the amount of $3,309,670.39 plus interest. Satisfaction of the aforesaid judgment and supplemental judgment was entered and filed in the Office of the Clerk of said Court on March 3, 1961.

42. In the action entitled Sidney S. Henis and Paul E. Kern v. Compania Agricola de Guatemala and International Railways of Central America, Civil Action No. 1530, in the United States District Court for the District of Delaware, commenced on March 30, 1953, the plaintiffs therein including one plaintiff who was also an intervenor plaintiff in the Ripley action referred to in par. 41 of this answer, and with the knowledge of the same attorneys who now represent the plaintiff International Railways of Central America in the present action, brought a representative and derivative stockholders action on behalf of the present plaintiff International Railways of Central America, seeking to cancel and rescind the issuance in 1936 of 185,000 shares of common stock of International Railways of Central America to Compania Agricola, being the stock referred to in par. 20 of the present amended complaint. The complaint in said action was dismissed by the United States District Court for the District of Delaware, 116 F. Supp. 223, aff'd 210 F.2d 950.

43. By reason of the foregoing, the first and sixth claims in the present amended complaint and so much of the third and fifth claims as relate to matters occurring

before the year 1961 have been merged in and extinguished by the judgments obtained in said Ripley and Henis cases.

FOR A FOURTH DEFENSE

44. Defendant repeats and realleges pars. 41 and 42 of this answer.

45. The prosecution of the first and sixth claims involved in the present amended complaint and so much of the third and fifth claims as relate to matters occurring before the year 1961 is barred by the rule which forbids the splitting of claims or causes of action.

FOR A FIFTH DEFENSE

46. The fifth claim fails to join an indispensable party, to wit Compania Agricola de Guatemala, which is the corporation alleged in said fifth claim to have made the contracts in question.

FOR A SIXTH DEFENSE

47. This Court lacks jurisdiction of the subject matter of the fifth claim.

FOR A SEVENTH DEFENSE

48. The sixth claim fails to state a claim against defendant upon which relief can be granted.

WHEREFORE defendant demands judgment dismissing the amended and supplemental complaint with the costs and disbursements of the action.

New York, New York
December 19, 1973

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By David Klingsberg
A Member of the Firm

Attorneys for Defendant

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

-against-

UNITED BRANDS COMPANY,

Defendant.

65 Civ. 479 - MIG

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

-against-

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

72 Civ. 649 - MIG

PRETRIAL ORDER NO. 2

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, the following action was taken:

I. Plaintiff's motion for leave to file an amended complaint is denied insofar as it seeks to amend the Fifth Claim of its complaint against United Brands Company (United) to assert a claim based on alleged torts including breach of fiduciary duty, and is granted insofar as it seeks to reallege paragraphs 29 through 38 as part of the Third Claim against United. Plaintiff's motion for leave to file an amended and supplemental complaint against United with respect to its damage claims is granted. Defendants

may file an answer to the amended and supplemental complaint within one week after being served with it.

II. The trial of this action shall be based upon the pleadings as amended and supplemented, except that plaintiff has abandoned the second and fourth claims of the amended complaint against United.

III. A. The parties shall on or before January 9, 1974, submit proposed findings of fact and conclusions of law on the issue of liability and serve these upon the adversary party.

B. The Court will prior to trial receive from either party or both parties an indication of the findings of fact and conclusions of law proposed by the adversary party with which it does not agree.

C. The final date for designation of exhibits is extended to December 28, 1973.

D. The date for exchange of witness lists shall remain December 3, 1973; but each party may apply to the Court for leave to add to the list on or before December 31, 1973 if there is a good faith reason for doing so.

E. The date for exchange of pretrial briefs is extended to January 14, 1974.

F. On December 10, 1973, defendants will furnish plaintiff with marked copies of the portions of depositions they will offer at trial; and thereafter, the parties will follow the same procedure and time schedule set forth in paragraph 5 of Pretrial Order No. 1 for designation of plaintiff's depositions.

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G. Interrogatory answers to be offered by each party shall be designated at the times provided in this Order and in Pretrial Order No. 1 for designation of depositions.

H. As part of the exchange of exhibit designations provided in paragraph 4 of Pretrial Order No. 1, and extended by this Order to December 28, 1973, the parties will in good faith specify the findings, exhibits and pages of transcript of the Ripley case which they plan to offer in evidence at this trial; and by January 14, 1974, each party may designate any additional document that was an exhibit or transcript in the Ripley case which is necessary to oppose a proposed finding of fact submitted on January 9, 1974 by the other party.

I. As part of the designation of trial witnesses, each party shall provide a brief summary statement of the subject of any opinion testimony to be elicited from each witness. On or before January 11, 1974, each party shall provide a brief summary of the opinion testimony.

J. Except as provided or changed herein, all the provisions of Pretrial Order No. 1 remain in full force and effect.

IV. The trial in this action shall commence on January 21, 1974 at 10:00 a.m.

V. Plaintiff's contentions are as follows:

Antitrust Claims

1. In 1928 and 1936 United (with CAG after its formation) acquired a controlling stock interest in IRCA.

complaint against United) or October 9, 1962 (in the case of the complaint against CAG) and December 31, 1962, governed by extrinsic factors and legitimate business considerations, or was it reduced in order to cease or substantially terminate business?

53. Were CAG's other actions with respect to its operation of the Tiquisate banana business consistent with continuation of business?

54. Is United liable for a breach of contracts by CAG?

55. If so, can United's liability cover a period greater than that of CAG, i.e., prior to six years before the filing of the complaint against CAG on October 9, 1968?

Dated: ~~December~~ JANUARY 23, 1974
New York, New York

MURRAY GURFEIN
U.S.D.J.

100A

Filed April 26, 19

#40643

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

-against- 65 Civ. 479

UNITED BRANDS COMPANY,

Defendant.

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

-against- 72 Civ. 649

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

- X

APPEARANCES

LEVENTRITT, LEWITTES & BENDER
New York, N.Y.
Attorneys for Plaintiff

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
New York, N.Y.
Attorneys for Defendants

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GURFEIN, D.J.:

Rulings on Collateral Estoppel

This action, fully described in International Railways of Central America v. United Brands Company, 358 F. Supp. 1363 (S.D.N.Y. 1973), sounds in contract and antitrust. The earlier action between the same parties, International Railways of Central America ("IRCA") and United Fruit Co. (now United Brands) ("UF") resulted in a judgment for IRCA in the state courts in 1957. It was affirmed by the Appellate Division, 8 A.D.2d 310 (1st Dept. 1959), and by the Court of Appeals. Ripley v. International Railways of Central America, 8 N.Y.2d 430 (1960). A supplemental judgment awarding further damages was entered on March 1, 1961. In 1954, the United States started an antitrust suit against UF which resulted in a consent decree in 1958, requiring UF to dispose of its IRCA stock not later than June 30, 1966.

On February 16, 1965, this action was commenced. It was met by a motion to dismiss the antitrust claims on the theory that the facts presented to the Ripley court were substantially the same as presented by this litigation,

and that the plaintiff was trying to split its cause of action. The District Court dismissed the antitrust claims, 254 F. Supp. 233 (S.D.N.Y. 1966), but was reversed as to this by the Second Circuit Court of Appeals, 373 F.2d 408 (2 Cir. 1967) (Friendly, J.)

That court held that "[s]ince the Ripley complaint did not and could not properly have asserted a claim under the federal antitrust laws, because the New York courts do not have jurisdiction to determine such issues], the judgment cannot have adjudicated that UF violated them. . . . The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that." 373 F.2d at 419.

That is a matter for solution now.[1/] Under Pretrial Order No. 2, III H, the Ripley findings to be

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1/ The Court has been cited to no case where collateral estoppel based on a state non-antitrust trial was invoked in a federal antitrust action.

specified were to have been designated by December 28, 1973 and additionally by January 9, 1974.

The parties were unable to resolve the issue whether the Ripley findings by Referee Hammer were to be accepted by this Court on the antitrust claims on the theory of issue preclusion or collateral estoppel, and failed to make the designation as provided. Since a trial date had been firmly fixed by pre-trial order and out of state witnesses were expected, determination of the admissibility of the Ripley findings on the antitrust claims was left for decision after the evidence in the trial on liability had been presented. No one has objected to this procedure. The plaintiff has now put forward the Ripley findings it wishes to have this Court consider on the theory of collateral estoppel. The defendants have, on one particular issue -- the reasonableness of certain rates and charges -- pointed to the lack of findings by the Ripley court as disposing favorably of the defendant's contentions in this regard. Both sides have briefed the matter extensively and extremely well.[2/]

2/ The plaintiff also "designates" portions of the "Report and Decision" of the Referee. Since the Report and Decision is only a gloss on the Findings, I will not consider any part of the Report and Decision of the Referee as a "finding of fact."

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The question of collateral estoppel or, as it is now more precisely called, issue preclusion, is one that has vexed the courts since the days of Lord Coke. On the one hand, it is neither fair nor economical to relitigate an issue of fact that has already been determined between the same parties. On the other hand, as every trial lawyer knows, less attention is given to the trial of issues that are not thought to be essential to the judgment. Indeed, it is sometimes strategic to lose on an issue not deemed germane so as to win on another thought vital to the ultimate decision.

The A.L.I. Restatement on Judgments Second has now come to tell us in Tentative Draft No. 1, § 68h:

> "Determinations not essential to the judgment. If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation."

That is essentially the rule of this circuit. In Halpern v. Schwartz, 426 F.2d 102 (2 Cir. 1970), Judge Smith wrote:

> "It is well established that although an issue was fully litigated and a finding on the issue was made in the prior litigation, the prior judgment will not foreclose reconsideration of the same issue if that issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment." (Id. at 105).

To determine which of the Ripley findings are binding on the particular issue involved, we must, therefore, look to the complaint in the Ripley action, the judgment therein, and the description of the issues involved in the opinions of the appellate courts in that case.

After we have determined which of the findings were not necessary to the decision, and discarded those as not binding, we must then explore with respect to the remaining findings, the questions of remoteness

in time and whether they are relevant to the present action.[3/]

I

It has seemed to me from the beginning that on the contract action we are trying, most of the Ripley findings relating to the contracts would serve to preclude the particular issues on the present contract claim, and I so indicated in my disposition of the summary judgment motion. See 358 F. Supp. 1363, 1374 (S.D.N.Y. 1973).

The difficulty arises on the antitrust claims. Although Judge Friendly has told us that this antitrust action is a claim for relief different from the claims involved in Ripley, that is not necessarily dispositive of particular issues that were fairly tried. The ultimate

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3/ The enormous problems involved in dealing with the Ripley record may be seen from the following. The printed report and decision of Referee Hammer occupied 310 pages. The trial consumed 176 trial days, pre-trial depositions totalled 3,211 pages, discovery covered more than 500,000 pages of documents, the stenographic transcript covered 25,830 pages, and the parties put in evidence 5,900 exhibits.

The Ripley plaintiffs proposed 1,190 findings of fact and defendant United Fruit proposed 433 findings of fact.

The plaintiff here designates 456 Ripley findings. I am allowing 111 to be designated.

test is whether the determination of those issues was necessary to the decision.

To reach that point in analysis we must first consider the complaint in Ripley. That complaint did not allege violations of the federal antitrust laws; that would have been a futile act. The gravamen of the claim in Ripley was that UF dominated IRCA for its own advantage, paid it less than the published rates for freight haulage and less than was reasonable, and hence breached its fiduciary duty to IRCA. There was no judgment in Ripley concerning restrictions of shipments by United. 4/ Judge Van Voorhis, writing for the Court of Appeals said:

> "The point in the case insofar as the New York courts are concerned is not so much whether Irca has fostered a monopoly in United in the Guatemalan banana business, as whether it has been adequately paid for what it has done for United."
> 8 N.Y.2d at 446) (Emphasis added).

4/ "In summary, we agree that plaintiffs clearly established a case of domination and control of IRCA by UFCo, which imposed upon UFCo a fiduciary obligation to treat fairly with IRCA. The evidence was convincing that the rates charged by IRCA to UFCo and Agricola were not fair to IRCA under all of the circumstances. Hence, IRCA was entitled to be recompensed for the unjust enrichment of UFCo, the fiduciary, at the expense of IRCA. . . ." Ripley v. International Railways of Central America, supra, 8 A.D.2d at 329.

The plaintiff contends, for a variety of reasons, that practically all the Ripley findings should be accepted in the antitrust case. The defendants contend that none of them is binding. Neither side is entirely right. It seems reasonably clear that issues of fact regarding illegal monopoly and unlawful suppression of competition were not essential to the determination of the claim of breach of fiduciary duty arising out of failure to bargain at arms' length.[5/] That is not the end of the inquiry, however. For there were issues of fact tendered which, within the rubric of "domination," were an integral part of the proof that laid the foundation for the finding of breach of fiduciary duty. That does not include, however, the motivation for dominating IRCA, for proof of motive was not essential to proof of the domination which founds the fiduciary duty.

It is my present task to separate those findings which might tend to resolve some non-ultimate issues in

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5/ Many of these issues have been the subject of independent proof, of course, on the trial of this action.

the antitrust case, and which were also necessary to the Ripley judgment from those which speak principally to the issues of monopoly and suppression of competition.

Appendix A are my rulings on the proposed Ripley findings. The comment "U.R." means "unnecessary to Ripley judgment."

II

The defendants pose another problem. They object to all of the plaintiff's designated findings, so far as they relate to the antitrust claims, concerning acts and practices prior to the February 16, 1961 limitations period fixed by the Second Circuit, which did not continue into the relevant period. The first claim charges, inter alia, a violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) for the period from 1928 through December 1961 by alleged represssive tactics by UF which prevented other shippers from using IRCA. The third claim also charges this violation by the alleged restriction of UF's own banana shipments over IRCA 1949-1964, but alleges a conspiracy to the date of the complaint. The sixth claim charges a violation

of Section 7 of the Clayton Act (15 U.S.C. § 18) through the allegedly unlawful acquisition of IRCA stock in 1928 and 1936 by UF, resulting in alleged injury to the business and property of the plaintiff through 1967.[6/]

The plaintiff contends that under the Supreme Court ruling in Zenith Radio Corp. v. Hazeltine Corp., 401 U.S. 321, 338-40 (1970), the plaintiff may recover for UF's violation of the antitrust laws prior to February 16, 1961 because, as plaintiff contends, those violations caused damages to IRCA's business and property after February 16, 1961 which before that date were not provable as to their nature or amount.

This puts the cart before the horse. It is necessary to find which, if any, violations of the antitrust laws occurred, and which, if any, come within the difficult formulation of Zenith. Only after this determination is made can the relevant time period, if any,

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6/ The other claims have either been withdrawn or sound in contract.

prior to the limitations bar, be fixed.[7/] Having already excluded strictly antitrust issues found in Ripley, I will apply to those which survive because they had a bearing on the breach of fiduciary duty claim, the following limit. I will allow Ripley findings in this category as of December 31, 1955.[8/] This does not mean that I now accept all these findings as relevant, or that they establish causation for damages. That is a matter for the parties to argue in their final briefs. Those Ripley findings which are rejected for remoteness in time I have marked "T".

7/ In January 1962 UF disposed of its stock interest in IRCA, except for 100 shares.

8/ The antitrust violations are alleged to have begun as early as 1928. The period not barred by limitation begins January 16, 1961. The Court can hardly assume that overt acts thirty-three years before resulted in damages after 1961. A line must be drawn somewhere. For purposes of these rulings, I will be governed by the limit stated in the opinion.

Lastly, the defendants argue that many of the Ripley findings designated by the plaintiff concern issues that are irrelevant to this proceeding. Since the Ripley findings are tendered by the plaintiff to preclude issues, it would be wasteful to clutter the record with findings if the underlying evidence to support those findings would not have been admitted. On Appendix A there has been noted "I" to designate those deemed irrelevant to the present issues.[9/]

The plaintiff contends that, although Referee Hammer made his findings as of December 31, 1955, his awarding of supplemental damages in 1961 made the findings speak as of the latter date. I cannot accept that. There was no finding by Referee Hammer in the later judgment on whether any of the earlier findings were still valid as descriptive of the then current scene. Accordingly, any Ripley findings which are accepted by this Court speak as of 1955.

9/ The defendant UF contends that the Ripley court found in its favor that certain rates and wharfage charges were fair. There has been evidence tendered on this issue and I am not convinced that the failure to find is dispositive of the issue. I will exclude consideration of Judge Hammer's findings in this regard.

Nor can I acquiesce in the plaintiff's suggestion that I accept as evidence the underlying documents and testimony which had been offered in support of the Ripley case with respect to those findings which I have excluded. No authority has been offered to overcome the ordinary rules of trial evidence. If the particular Ripley finding is held not to preclude the issue, the determination of that issue can only depend on competent evidence, including, of course, the gamut of hearsay exceptions, from the federal business records rule, 28 U.S.C. § 1732, to admissions against interest.

In view of these rulings I will give each party ten days from the date of filing this opinion to request a further evidentiary hearing, with a specific statement of the facts the party intends to prove. If no request is made, the trial on liability alone shall be deemed to have been concluded. The schedules for briefing and days for oral argument remain in effect.

It is so ordered.

April 25, 1974

[redacted]

U.S.D.J.

APPENDIX A

1. All Ripley findings accepted as collateral estoppel speak not later than December 31, 1955, the date of the Ripley findings by Referee Hammer.

2. The following Ripley findings designated by the plaintiff are accepted as a collateral estoppel of the fact found:

B 1	B 173	B 200	B 389	D 125
B 2	B 174	B 201		D 127
B 3	B 175	B 202	B 390	
	B 176	B 203	B 391	D 166
B 60	B 178	B 204		
B 64	B 179	B 205	B 395]	D 173
B 65			thru]	
B 66	B 180	B 252	397]	D 188
B 68	B 183	B 255		
	B 184		B 399	D 193
B 70	B 185	B 276		D 199
B 71	B 186		B 403	
B 72	B 187	B 352	B 404	D 203
B 73	B 188	B 355		
B 78	B 189	B 356		D 240
		B 359	D 2	D 244
B 80	B 190		D 3	
	B 192	B 360	D 4	D 353
B 95	B 193	B 363	D 5	D 356
	B 195	B 365	D 6	D 357
B 137	B 196	B 366	D 7	D 359
B 138	B 196a	B 367		
	B 197	B 368	D 28	D 374
B 141	B 198	B 369	D 29	D 377
B 142	B 199			D 378
		B 372	D 30	
B 156		B 373		D 383
B 159		B 374	D 41	
		B 375	D 42	D 453
		B 376		D 454
		B 377		
				D 475

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3. The following Ripley findings designated by the plaintiff are rejected and marked U.R.:

B 45

B 94

B 165

B 276
B 277
B 279

B 288]
thru]
B 295]

B 301]
thru]
316]

B 317
B 318
B 318a
B 319

B 320
B 321
B 322
B 323
B 324
B 325
B 326

B 327]
thru]
B 335]

D 45
D 46
D 48
D 49

D 50]
thru]
D 52]

D 56]
thru]
D 99]

D 100]
thru]
D 104]

D 106
D 109

D 112

D 141
D 142

D 157

D 171
D 172

D 226]
thru]
228]

D 248]
thru]
255]

D 261]
thru]
264]

D 272
D 273
D 274

D 278]
thru]
280]

D 289]
thru]
291]

D 295

D 318

D 344
D 346
D 347

D 385

D 395
D 396

D 399]
thru]
406]

D 408
D 409

D 412]
thru]
D 447]

D 460]
thru]
463]

F 26

F 101
F 103
F 107
F 108

4. The following Ripley findings designated by plaintiff are rejected and marked "T":

B 86 thru B 91
B 113a thru B 129
B 132
B 346 thru B 351
D 32 thru D 38
D 167
D 387 thru 393
D 477
D 485 thru 499
D 511

5. The following Ripley findings designated by plaintiff are rejected and marked "I":

B 70a
B 92
B 93
B 96
B 97
B 146
B 147
B 148
B 358
B 364
B 370
B 371
B 378 thru B 388
D 452
D 455
E 1 thru 58

6. The following Ripley findings designated by plaintiff are rejected as not true findings of fact:

D 237 thru D 239

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UNITED STATES DISTRICT COURT

CHAMBERS OF
JUDGE MURRAY I GURFEIN
UNITED STATES COURT HOUSE
FOLEY SQUARE
NEW YORK N Y 10007

May 6, 1974

Leventritt Lewittes & Bender
Chrysler Building
New York, N.Y. 10017
Att: Sidney Bender, Esq.

Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, N.Y. 10022
Att: David Klingsberg, Esq.

Re: International Railways of Central America
v. United Brands Company - 65 Civ 479 and
v. Compania Agricola De Guatemala - 72 Civ 649

Gentlemen:

I acknowledge receipt of letter of May 1st from plaintiff's counsel and letters of May 2nd and May 3rd from defendant's counsel.

I was conscious when I wrote the opinion that Referee Hammer wrote his opinion in 1957. I nevertheless held that the findings speak as of December 31, 1955, and I adhere to that decision.

With respect to the findings mentioned in the plaintiff's counsel's letter of May 1st, by failing to include them in the Ripley findings accepted as collateral estoppel, I intended to reject them.

What I failed to note is the specific category of rejection and I shall do so now:

B 278 is I
D 360, D 364-5 is UR
D 500-502 is T
E 60-2 and E 66 is I
E 69-73 is T
F 18-20 is I and
F 22-25 is UR

Very truly yours,

U.S.D.J.

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COPY

U.S. DISTRICT COURT
FILED
MAY 1974
S.D. OF N.Y.

#46663

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

65 Civ. 479

-against-

UNITED BRANDS COMPANY,

Defendant.

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

72 Civ. 649

-against-

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

- X

APPEARANCES

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Attorneys for Plaintiff

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
New York, N.Y.
Attorneys for Defendants

GURFEIN, D.J.:

Supplemental Memorandum re Ripley Findings

In my memorandum of April 25, 1974 I ruled that certain Ripley findings proffered by the plaintiff, one hundred and eleven in number, would be accepted in this trial and that others would be rejected. I suggested in that memorandum that I would give the parties ten days to request an additional evidentiary hearing "with a specific statement of the facts the party intends to prove."

My obvious intention was to consider presently available evidence which would serve to fill in relevant material that had not been presented, perhaps in the erroneous belief that a particular Ripley finding would be held acceptable. I do not believe that, in view of the pre-trial order and the extensive evidence produced by both parties in a twelve-day trial on liability alone, either party is entitled to reopen the trial for remote, or discursive or cumulative evidence.

Instead of offering a "specific statement of the facts the party intends to prove," in accordance

with my memorandum, the plaintiff suggests a reopening of the trial for proof of certain conclusions embodied in Ripley findings without a statement of what underlying facts will be proved or how they will be proved, or of which particular acts, though barred by limitations, have a bearing on liability.

Although the plaintiff relies on Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-40 (1971), it fails to indicate which acts, now sought to be proved additionally, committed during a period barred by the statute of limitations, resulted in damages the accrual of which was "speculative or their amount and nature unprovable." 401 U.S. at 339.

The plaintiff now tenders 22 items of which it wishes to make proof, although it does not admit that any of these "has not already been proved directly or by fair inference."

Of these 22 items, 17 are clearly referable to a time before December 31, 1955 and would not come within my date of cleavage for the Zenith formula; nor is there any statement of why these particular items resulted in damages in the allowable period which were not determinable until then.

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The other five seem to be cumulative on issues already tried rather extensively.* Needless to say, I am not passing on inferences to be drawn at this time.

Accordingly, I see no reason for further evidence to be taken in the trial on liability. That trial may be considered closed, and the parties will adhere to the briefing schedule heretofore ordered.

It is so ordered.

May 14, 1974

MURRAY I. GURFEIN

U.S.D.J.

* These are items 13, 16, 17, 19 and 21.

RIPLEY FINDINGS DESIGNATED BY THE PLAINTIFF AND ADMITTED IN EVIDENCE AS A COLLATERAL ESTOPPEL OF THE FACT FOUND:

B1. Since the incorporation of IRCA in 1904, it has been under the practical control of United.

B2. Since 1904, United has exercised effective control and domination over the direction, management and operation of IRCA.

B3. At all times relevant to this case, IRCA has been under the practical control of United and United has exercised effective control and domination over the direction, management and operation of IRCA.

B60. On July 26, 1928, the purchase of Keith's stock in IRCA was consummated, 30,000 shares of IRCA preferred stock being purchased at $80. per share by Schroder and its associates, 69,000 shares of IRCA common stock being purchased at approximately $50.25 per share by United, 21,000 common shares at $45.31 per share by Fleming and its associates.

B64. In July, 1928, the authorized and issued common stock of IRCA consisted of 300,000 shares; by the purchase of 69,000 shares of the Keith stock United became the owner of the largest single block of those shares, being already the owner of 2000 shares.

B65. By due IRCA corporate action in August, 1928, the authorized number of shares of IRCA common stock was increased from 300,000 to 500,000.

B66. On Palmer's approval, Schroder and Blyth Witter & Co. received in September, 1928, 15,000 shares of the newly

authorized common stock in exchange for the cancellation of the fiscal agency.

B68. Before the end of 1928, a voting trust was established into which the common stock acquired from Keith, plus additional common stock owned by the members of the syndicate, was placed.

B70. There were five voting trustees, Keith, two named by United, two by Schroder - Blyth Witter & Co.; in the voting trust agreement, United's right of nomination was concealed by substituting Old Colony Trust Company of Boston, as the nominating party; which acted in this respect as agent for United.

B71. Following the 1928 stock acquisition United was in actual control of the operations and operating management of IRCA.

B72. Selection of new top railroad management was turned over to United by Schroder once the stock purchase of 1928 had been agreed upon.

B73. Policy questions concerning IRCA operating matters were similarly turned over to United for decision, Schroeder relying on United judgment in this area.

B.78. Decisions as to selection of directors were actually made by United in informal consultation with Schroeder.

B80. United kept its newly-acquired ownership of IRCA stock and its control over IRCA operations secret from the public and did not inform the stockholders of IRCA (other than

the bankers) following the 1928 acquisition. Schroeder voluntarily collaborated with United to this effect.

B95. Another purpose of United in acquiring such stock* was to perpetuate its existing management control over IRCA operations in its own interest.

B137. United refused this suggestion except to the extent ultimately set forth in the agreement of September 17, 1936, as follows:

> "... The Guatemala Company (CAG) agrees for itself (and to obtain the agreement of its affiliates) that no change shall be made in these agreements and that no new contracts shall be entered into between the Railway Company and the Guatemala Company, or any of its affiliates, without the approval of a majority of the directors of the Railway Company, other than any directors who may represent, or have been nominated in the interests of, the Guatemala Company or its affiliates."

B138. The effect of this provision in the 1936 agreement was, to prevent United from reducing the rates it was paying to IRCA without the consent of such independent directors as might be on the IRCA Board; and that an increase in such rates, would require United concurrence.

B141. The acquisition by United of 185,000 shares of IRCA common stock, when added to the shares previously acquired in and before 1928, gave United over 50% of the authorized common stock and 42.67 of the total voting stock of IRCA.

B142. United's stock has constituted the numerical majority of all shares actually voted at IRCA annual meetings for the election of directors since 1938.

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* in 1936.

B156. At all times since the incorporation of IRCA in 1904 (with the exception of the period 1924-1929 and a brief period following Palmer's death in 1946), the IRCA Board of Directors has included one director who was also a director or official of United.

B159. Since 1928, the United officer in charge of its tropical operations has acted as Special Advisor to the IRCA Board of Directors, to the Chairman of that Board and to the President of IRCA.

B173. Whenever the Chairman of the Board of IRCA took action on any matter of importance he sought the advance advice and approval of the Special Advisor; no IRCA matter of importance to United was ever resolved contrary to Pollan's advice.

B174. On matters of common interest between IRCA and United, the Special Advisor would secure United approval directly from its Board of Directors and IRCA approval from the IRCA Board Chairman or the IRCA President.

B175. The Special Advisor customarily reported to United on events transpiring at IRCA Board meetings affecting United, including discussions at the IRCA Board of IRCA-United contract negotiations.

B176. The IRCA Board of Directors looked to the Special Advisor as the chief spokesman for United vis a vis IRCA and as the adviser of IRCA policy decision.

B178. The Special Advisor was more fully informed on IRCA's affairs than any director of IRCA.

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126A

B179. Unlike other directors the Special Advisor was in direct and continuing contact with the chief operating officials of IRCA on all phases of IRCA operations.

B180. The President of IRCA consulted the Special Advisor in advance of submitting matters to the IRCA Board with knowledge that the position of the Special Advisor would determine the Board's action. As stated by the Special Adviser:

> "They both discussed those things with me at length very often before they talked to the board, and the reason was they knew I could kill it or help it in the board in my position as adviser."

B183. The Chairman of the Board customarily secured the approval of the Special Advisor before transmitting instructions and advice to IRCA officials.

B184. The Special Advisor acted both as spokesman for United and for IRCA in informing the IRCA management as to the persons to be nominated annually to the IRCA Board.

B185. The Special Advisor had an official status on the IRCA Board at least equivalent to that of a director.

B186. The IRCA Board of Directors and officers considered the Special Advisor as the IRCA offical of greatest knowledge, interest and influence and looked to him for decision on all matters of railroad operation, both as to policy and detail.

B187. The Special Advisor was one of the most important means through which United exercised practical control and domination over IRCA.

B188. The officer of United serving as IRCA Special Advisor did so as part of his functions as an officer of United.

B189. The officer of United serving as IRCA Special Advisor did so mainly in the interest of United and coincidentally in the interest of IRCA, and upon any conflict his interest was that of UFCo.

B190. The officer of United serving as IRCA Special Advisor did not inform IRCA of United's personal interest in actions recommended or approved by him as such Special Advisor.

B192. At the times of negotiation and of approval by the IRCA Board of Directors of every contract entered into between United and IRCA from 1904 to date, United directors or officials were serving on such Board as directors or special advisors of IRCA.

B193. In all of the negotiations of such contracts with IRCA, United was represented by United directors and officials who at the time were also IRCA directors or Special Advisors.

B195. The directors of IRCA did not exercise independent judgment with respect to the rates charged and the services rendered by IRCA to United.

B196. The directors of IRCA relied wholly upon the operating officials of IRCA, and particularly on the President of IRCA, with respect to the rates charged and the services rendered by IRCA to United.

B196a. The directors of IRCA were deprived of the basic information as to costs, revenues, engineering matters, etc. upon which any independent judgment as the propriety of the rates to be charged United could be formulated.

B197. All this was by the directors with knowledge that United was the largest single shipper over and largest single stockholder of IRCA.

B198. This was by the directors with knowledge that the IRCA Presidents, who were the chief operating officials of IRCA, were all former United employees or associates and had been selected by United for the position as IRCA President.

B199. The operating officials of IRCA, and particularly the President of IRCA did not exercise independent judgment with respect to the rates charged and services rendered to United.

B200. In negotiating with United's representatives concerning rates and services, the IRCA operating officials were negotiating with persons who were their superiors in IRCA, namely directors of IRCA and Special Advisors to the Board and the President of IRCA.

B201. In negotiating with United's representatives concerning rates and services, the IRCA operating officials were not in a position to negotiate at arm's length since such United representatives were, as IRCA directors and Special Advisors, in possession of full information as to IRCA's affairs.

B202. In negotiating with United's representatives concerning rates and services, the IRCA operating officials were not in a position to bargain at arm's length because of United's active control over IRCA's operations.

B203. In negotiating with United's representatives concerning rates and services, IRCA's presidents were not in a position to bargain at arm's length because their selection

as president and continuation in office was determined by United and depended upon cooperation with United.

B204. In negotiating with United's representatives concerning rates and services, President Bradshaw of IRCA has not been in a position to bargain at arm's length because of his United affiliation.

B205. In negotiating with United's representatives concerning rates and services, the IRCA operating officials were not in a position to bargain at arm's length because of United's position as chief stockholder of IRCA.

B252. United, since at least 1928, has exercised control and domination over the selection of IRCA's principal operating officials.

B255. Since 1928, many of the chief operating officials of IRCA have been persons transferred to IRCA from United; the positions with IRCA filled by such persons have included that of Vice-President, Assistant to the President, Assistant to the Vice-President, Chief Engineer, Traffic Manager, Roadmaster, Materials Superintendent, Manager-Salvador Division, General Superintendent of Transportation-Guatemala Division, Port Superintendent, etc.

B276. United has controlled and dominated, since 1928, the IRCA rates charged and the type of IRCA service rendered to United and CAG as shippers of bananas, as is more fully described in Findings B352 et seq. below.

B352. On August 7, 1930, United and IRCA entered into a Rate Agreement. Reference is made to the terms of that agreement (PX 13) as if set forth at length in these findings.

B355. Because of United's domination and control over IRCA operations, IRCA did not consider itself in a position to oppose United insistence on a rate reduction; IRCA furnished United with IRCA's cost studies and simply relied on United to be fair to IRCA in the terms and application of this agreement.

B356. Under the 1930 Rate Agreement, United obtained:

(a) A reduction of the Atlantic banana rate substantially back to the 11 1/2 cents per stem provided in the old 1913 contract;

(b) A new Pacific rate to IRCA's new pier at San Jose of 15 cents per stem;

(c) The right to build branch lines joining IRCA's main Pacific line;

(e) An acknowledgement that the prior contracts, except as above modified remain in effect, including all the preferences to United stated in such contracts.

B359. On February 3, 1933, United and IRCA entered into a contract "Amplifying and Extending Previous Agreements", which, in substance, extended the 1930 Atlantic rate agreement for a further term of five years, including all the preferences to United granted in former contracts. Reference is made to the terms of that contract (PX 14) as if set forth at length in these Findings.

B360. On the same date, the parties entered into a "Supplemental" contract, by which:

(a) A rate identical with the Atlantic rate was fixed for 25 years for transporting bananas from the Pacific side of Guatemala to IRCA's Pacific ports;

(b) A rate of $60 per car was fixed for 25 years for transporting bananas from the Pacific side of Guatemala to Puerto Barrios; independents were to pay not less than the equivalent of 2 1/2 times that amount for such transportation;

(c) The various privileges and preferences granted United under previous contracts were made applicable to transportation of United's bananas from the Pacific side;

(d) IRCA was obligated to transport promptly all bananas tendered by United on the Pacific side; no obligation was imposed on United to ship any such bananas; no right was given IRCA to limit the quantity of bananas tendered by United, regardless of the capacity of IRCA to handle such bananas or the effect on other traffic over the 300 mile distance such bananas would move. Said 300 miles comprised the major portion of IRCA's track and the most heavily travelled section;

(e) United reserved a unilateral right of cancellation of the contract, in the event of adverse change in the preferential rate differential between its charges to United and to independents, even though the change in the

charge to independents was required by court decision or governmental decree.

B363. Both 1933 agreements, for the first time in the history of the two companies, referred to them as "connecting carriers."

B365. Having decided to proceed with a large scale development of western Guatemala, shipping the fruit over IRCA to Barrios, and having determined to secure full working stock control over IRCA to assure United's continuing position of dominance over the railway and its rates (see Findings B88 et seq. above), Zemurray of United insisted on a revision of the form of the existing contracts between United and IRCA.

B366. The revision desired by Zemurray was one which would not affect the substance of the arrangements between IRCA and United with respect to the rates paid by and the preferences granted to United; it was to be a revision designed merely further to disguise those rates and preferences.

B367. The disguise prescribed by Zemurray, was that United would appear to be supplying its own cars and locomotives for the movement of its bananas from Western Guatemala, that IRCA would be engaged by contract to operate that equipment for United, and that United would be paying IRCA for the use of IRCA's tracks over which the equipment would move and for the services of IRCA in moving that equipment.

B368. The appearance that United was furnishing its own equipment, cars and locomotives, was accomplished as follows:

(a) In the so-called "Main Contract" of September 17, 1936, under which United's subsidiary, CAG, was to acquire

185,000 shares of IRCA common stock, (1) recitals were made of the need of additional rolling stock to handle CAG's new Pacific developments and of CAG's desire to assure the availability of such equipment for that purpose and, (2) a provision was inserted by which CAG agreed to purchase 10 new locomotives and 300 banana cars for such use. Reference is made to the terms of that contract (PX 25) as if set forth at length in these Findings.

(b) A formal letter of recommendation of this arrangement by IRCA President Myers to the IRCA Board Chairman was prepared under United supervision to be kept in the IRCA files, which stated, in substance, that the banana business was subject to too many hazards to justify a commitment by IRCA to provide the additional equipment necessary to handle the Pacific banana traffic, and that, therefore, Myers had worked out an arrangement for CAG to provide its own equipment and haul its own bananas over IRCA's tracks.

(c) A letter from IRCA to its stockholders soliciting their votes in favor of the arrangement was prepared under United supervision, reiterating the undesirability of investment by IRCA in the equipment necessary to move the CAG bananas and stating that the proposed contract relieved IRCA of such burden via CAG's agreement to purchase the rolling stock to be so used.

B369. Such appearance of the furnishing of equipment by United was misleading and not a candid statement of fact in that a separate arrangement was made by letter between IRCA and CAG under which IRCA agreed to repay to CAG the cost of the very equipment which United, through CAG was purportedly furnishing. Reference is made to the terms of that letter arrangement (PX 18) as if set forth at length in these Findings.

B372. Two additional contracts were entered into between United (through its subsidiary, CAG) and IRCA:

(a) One contract, dated September 17, 1936, and entitled "For Trackage Rights", purported to be a grant by IRCA to CAG of the right to run CAG's equipment carrying bananas over IRCA's tracks to Puerto Barrios for a term of 25 years for a payment to IRCA of $30 per car.

(b) Under the second contract, simultaneously executed and entited "For Operation of Trains", IRCA agreed, for a similar 25 year term, to furnish the personnel for and to operate, fuel, maintain, repair and be responsible for the CAG equipment which was covered under the "Trackage"

contract, in the transportation of bananas from western Guatemala to Barrios; for such service IRCA was to be repaid its total expenses incurred.

(c) All of the special privileges and preferences enjoyed by United under the previous contracts were declared applicable to both new contracts.

(d) By separate letter arrangement (PX 18) the amount of expenses for operation of trains to be paid by CAG to IRCA was determined at $30. An adjustment provision, similar to that appearing in the 1933 agreement (PX 15, see Finding B361 above), was included; to the extent that such provision required action by the Board of Directors and/or officers of IRCA to take advantage of its terms, such provision was without substance in view of United's control and domination over IRCA.

B373. The so-called "Trackage Rights" and "Operation of Trains" contracts were to further conceal the special rates and preferences held by United.

B374. No substantial change was effected by the 1936 contracts with respect to the transportation of bananas by IRCA for CAG; under both the pre-existing contracts and the 1936 contracts, IRCA was to run the trains, furnish the facilities of track and wharf, pay for the cars and locomotives used in the traffic, and grant the special privileges and preferences, all for the sum of $60 per car for a term of 25 years.

B375. The parties did not regard the 1936 rate and operating agreements as effecting any substantial change; the division of the $60 rate into two parts, $30 for "trackage" and $30 for "operation of trains", was considered by the parties to be unimportant as between United and IRCA.

B376. After 1936, IRCA banana cars, in addition to CAG-owned cars were used to transport CAG bananas from Tiquisate to Barrios; in order to indicate that Agricola was supplying the equipment in which its bananas moved, United caused IRCA to remove IRCA's own name from the IRCA banana cars and to substitute the name of CAG in its place.

B377. The 1936 rate and operating agreements were arranged between IRCA and United in the light of United domination and control over IRCA.

B389. By 1947, with the post-war growth of independent banana shipments and of active Government interest, the United operating officials in Guatemala had become concerned lest the furnishing of equipment by CAG be investigated and found to disclose the payments made by IRCA for such equipment, thus destroying the formal facade erected in 1936; this concern was shared by Bradshaw.

B390. Accordingly, a revised equipment arrangement was worked out between the United officials and Bradshaw so as to supplement and strengthen the appearance that CAG was furnishing the equipment, as follows:

(a) Reference to charges against IRCA for amortization of the cost of the equipment plus interest on the unamortized balance, which had appeared in the 1936 letter arrangement, was to

be eliminated and in lieu thereof, a fixed annual sum was to be paid by IRCA for use of the existing CAG equipment and an annual sum equal to a percentage of cost was to be paid for such use of additional equipment when acquired by CAG;

(b) The fixed amounts and percentages were to be less than the amortization and interest charges specified in the 1936 agreements since they purported to be made only for such use as IRCA might make of the equipment when it was not in the CAG or United service.

B391. The apparent reduction in charges to be paid by IRCA was actually to be offset:

(a) By making the obligation of IRCA to pay an absolute obligation, in lieu of the previous (1936) arrangement under which the equipment payments were deductions from the $30 per car, when, as and if paid by CAG for operation of trains;

(b) By making the obligation of IRCA to pay a continuing one without regard to recoupment by CAG of the entire cost of such equipment via such payments, unlike the 1936 arrangement which granted free use to IRCA after CAG's cost had been fully amortized.

B395. As a result of these stockholder complaints, United decided to grant IRCA an increase in the rate on banana cars from western Guatemala to Barrios from the then-current $60 per car to $75 per car; United hoped thereby to quiet these stockholders and avoid further inquiry.

B396. In view of the change in the Pacific banana rate, the idea of executing a simple modification of the 1936 letter arrangement respecting equipment was discarded and, instead a new series of formal and other contracts was drawn, including:

(a) A 20-year "Trackage Rights" agreement, similar to that of 1936 but reducing the payments to be made to IRCA by CAG per car for such rights from $30 to $12;

(b) A 20-year "Operation of Trains" agreement, similar to that of 1936;

(c) A letter arrangement fixing the "operation of trains" payments at $63 per car and revising the equipment payments as indicated above.

B397. These 1948 agreements repeated parts of the antecedent 1936 agreements; division of the new rate of $75 per car into a $12 charge for so-called "Trackage Rights" and a $63 charge for "Operation of Trains" which were purely formal and did not reflect the substance of the situation.

B399. At the same time as these agreements concerning Pacific bananas were executed, United and IRCA also executed an agreement again fixing the rate on Atlantic bananas at 11 1/2 cents per stem; such rate had been in effect, substantially, since 1913 (with the exception of the years 1920-1930 when it was 15 1/3 cents).

B403. On May 22, 1952, a letter agreement supplementing the 1948 contracts was executed providing an effective CAG rate of $85 retroactive to July 1, 1951 and a rate of $90

from June 1, 1952; the latter to be adjusted up or down based upon future variations in the price of fuel oil; no mention was made of any other IRCA items of material or labor the cost of which might be subject to fluctuation. Downward adjustment to about $85 has actually occurred. Reference is made to the terms of that agreement (PX 1891) as if set forth at length in these Findings.

B404. At all times material to this litigation, the control and domination of United over IRCA has been directed, to the protection of the interests of United, even though such interests have been and are adverse to the interests of IRCA.

D2. Regular movement of export bananas by IRCA for United, from Western Guatemala to Puerto Barrios, began in 1932.

D3. As of October 7, 1930 up to October 26, 1932, the minimum rate on banana shipments for United from western Guatemala to Puerto Barrios was $90 per car.

D4. As of October 26, 1932 the rate on bananas transported by IRCA for United from Western Guatemala to Puerto Barrios (including port services) was reduced to $60 per carload.

D5. This total rate of $60 per carload remained unchanged until January 1, 1948 (except that as of September 17, 1936, it was stated in the form of $30 for trackage rights to United, and $30 for the operation of United's trains by IRCA).

D6. The total rate on bananas transported by IRCA for CAG from western Guatemala to Puerto Barrios (including port services) was $75 per car for the period from January 1, 1948

to June 30, 1951 (stated in the form of $12 for trackage rights, and $63 for the operation of trains); and was $85 per car for the period from July 1, 1951 to May 31, 1952 (stated in the form of $15 for trackage rights and $70 for the operation of trains); and was $90 per car for the period from June 1, 1952 to December 31, 1952 (stated in the form of $15 for trackage rights and $75 for the operation of trains).

D7. After December 31, 1952 the amount paid by CAG to IRCA for operating banana trains has been subject to adjustment up or down, for any variation in the C.I.F. prices of fuel oil purchased by IRCA for delivery in San Jose or Puerto Barrios. Under this arrangement the average total rate charged by IRCA to CAG for bananas transported from western Guatemala to Puerto Barrios (including port services) was $85.19 in 1953, $85.27 in 1954, and $85.28 for the period January 1, 1955 to August 31, 1955.

D28. The carloads of CAG bananas included in PX4068 and moved at the lower, so-called contracts rates of $60 and upward after January 1948, were transported inter-changeably in CAG-owned and IRCA-owned locomotives and banana cars. CAG-owned and IRCA-owned equipment is pooled for the haulage of CAG bananas (CAG equipment is leased to IRCA on a straight rental basis and is maintained by IRCA).

D29. In the Supplemental Contract dated February 3, 1933, between IRCA and United, covering Pacific Coast Rates, the rail rate specified for bananas delivered by independent shippers on the Pacific side for transportation to Puerto Barrios was a minimum of 50 cents per stem.

D.30. At a carload of 300 bananas, this stem rate was equivalent to $150 per carload.

D41. The basic charges since 1939 on independent bananas for export have remained unchanged; viz $130 per carload plus port charges (port charges at Barrios included a 15¢ per 100 pounds wharfage charge, a $1.00 per car weighing charge, plus additional charges for labor supplied by IRCA to perform various services in connection with the handling of the fruit at the port).

D42. The transportation of bananas requires highly specialized preferential treatment, from cutting to placing on railway cars, packing, moving in transit, and through to the transfer at the terminus or wharf to the ship.

D125. Most banana cars, unlike all other, return empty.

D127. In 1951 all bananas got almost 2/5 of the IRCA freight service in net ton-miles, and paid less than 1/5 of IRCA's freight revenue. In every year since 1935, all bananas got much more IRCA freight service in net ton-miles than their contribution to IRCA's freight revenue.

D166. The main line of IRCA's Guatemala Division runs between Puerto Barrios on the Atlantic Ocean and Ayutla on the Mexican border, a distance of 375 miles. CAG bananas, produced in the Tiquisate area, are hauled a distance of 305 miles. Some CAG purchased are hauled greater distances than 305 miles.

D173. CAG traffic has involved the following elements of extra cost to IRCA not necessarily required in respect to important segments of its non-banana traffic:

(a) The use of more heavy track and other improvements in roadbed.

(b) Use, maintenance and coordinated routing and handling of special equipment; namely, the

banana cars and the heavier locomotives.

(c) Greater need for "helper" locomotives.

(d) Relative inability to use available space in regular or other non-banana freight trains.

(e) More scheduling and dispatching service, involving also more supervisory time and more wages for lost time.

(f) Expedited repair of way and quipment.

(g) Extra labor and material costs of peak and slack periods.

(h) CAG traffic uses IRCA's most congested areas, Palin Hill and Barrios, while the great bulk of other traffic uses only one or neither of these congested areas.

D188. No port has ever been built at Concepcion del Mar on the Pacific Ocean. The CAG bananas in fact all moved over IRCA via the Barrios route to the Atlantic Coast.

D193. The IRCA Board was not shown to be hostile to a port at Concepcion. Withholding construction of such a port was not the determining reason for giving CAG a special rate on banana shipments to Barrios.

D199. Since 1912 IRCA has been the only railroad enterprise in Guatemala of any significance holding itself out, and operating, as a common carrier by rail, (there is a twenty mile line operated by the Government in the Coban area).

D203. The bulk of Guatemalan import and export traffic is transported through Puerto Barrios.

D240. Because United had and has exercised practical control over IRCA, because of the common directors, and because United furnished influential Special Advisers to IRCA, United had the following duties of a fiduciary toward IRCA:

(a) To exercise its power over IRCA faithfully and fairly.

(b) To promote IRCA's best interest.

(c) To fairly equalize United's interest to that of IRCA.

(d) To refrain from injuring IRCA in any manner.

(e) To refrain from appropriating any of IRCA's tangible expectancies.

(f) To refrain from putting itself in a position of potential conflict with IRCA.

D244. Any attempt by United to use alleged special opportunities or alternatives, not possessed by the general shipping public as a method of driving down the rates payable to IRCA puts United in a position of conflict with IRCA.

D353. The alleged port was not in fact considered by the parties as a factor in fixing the contract transportation rate for CAG bananas.

D356. The 1933 contract (PX 15), concerning shipment of bananas from Guatemala west to Barrios, nowhere recites the alleged proposed Concepcion port as any reason for setting a special, reduced rate of $60 per carload on such shipments.

D357. There were no discussions, in connection with the 1933 contracts, that the alleged proposed Concepcion port was any reason for setting a special, reduced rate of $60 per carload on such shipments.

D359. United's offer not to build a port at Concepcion, without IRCA consent, was made after the special $60 rate had already been agreed upon.

D374. There is no sufficient showing in the record that a proposed port at Concepcion was a bona fide element of negotiations between United (CAG) and IRCA for the charge to United (CAG) for transporting bananas from western Guatemala to Barrios.

D377. The evidence is insufficient to establish that the rate for CAG bananas was negotiated to induce United (CAG) to refrain from building a port on the Pacific coast and shipping its bananas through that port. The evidence also show the following:

(a) United's failure to disclose material engineering facts respecting the construction of a port at Concepcion, to the IRCA directors and management;

(b) The failure to disclose to the IRCA stockholders any connection between the alleged port and the amount of the CAG banana rate;

(c) Omission from the contract discussions of the alleged port as a factor in fixing the CAG banana rate; and

(d) Transfer of the stock and note by IRCA to CAG in exchange for the promise restricting port construction,

and are each additional grounds why the fair CAG banana rate is not limited by the alleged proposed port at Concepcion.

D378. There is no basis in fact justifying special rates to United (CAG) for the transportation of bananas by IRCA, on account of the alleged port referred to in United's west coast contract with the government of Guatemala (UF 111),

since IRCA has, at all times, been regarded as vital to the CAG banana business.

D383. To market CAG bananas required at all times that they be shipped over IRCA to Barrios.

D453. The 1936 agreements between IRCA and CAG arbitrarily divided the transportation arrangement into a trackage rights agreement and a train operations agreement.

D454. The purpose of the said measures concerning equipment and the split between trackage right and train operation was to make it appear, contrary to the actual facts, that IRCA was not performing a full transportation service in the haul of CAG bananas to Barrios. The purpose of the parties was to provide a colorable basis to justify the contract banana rate.

D475. The potential of a port at Concepcion does not justify the rate on CAG banana shipments to Barrios.

Certain Ripley Findings Designated by the Plaintiff But Not Admitted in Evidence As a Collateral Estoppel Of The Fact Found

(The titles and subtitles appearing on the following pages 146A-192A were not offered in evidence in the District Court.)

4. United Moves to Monopolize Guatemalan Bananas by Controlling IRCA.

B45. United knew that control over the operations of IRCA was a means to control over the banana business in Guatemala. U.R.

C. STOCK CONTROL 1936 TO DATE

1. United Decides to Take Sole Control.

B87. In the early 1930's, Samuel Zemurray became the dominant individual in United. T

B88. In 1934, Zemurray visited Guatemala and was enthusiastic about the potentialities of developing western Guatemala banana production, both by United directly and via United contracts for the purchase of bananas from local growers, the bananas to be transported over IRCA to Puerto Barrios on the Atlantic side. T

B89. Zemurray then informed Schroeder that this development of western Guatemala would be pursued by United if certain new conditions were met. To give UFCo dominant control. T

B90. One of these conditions was to be the acquisition by United of the 185,000 authorized but unissued shares of IRCA common stock. T

B91. One of United's purposes in acquiring such stock was further to insure its control over IRCA. The negotiations for the Zemurray new agreement and conditions were handled for UFCo by Palmer and Pollan with Simpson on May 23, 1935 at the Boston office of UFCo. T

B91A. Simpson recorded correctly what transpired as follows: T

"If the voting trust idea is abandoned, what it comes down to is dominant control of I.R.C.A.,

U.R. - Unnecessary to Ripley judgment.
I. - Irrelevant to present issues.
T. - Remoteness in time.

"though not necessarily 51% control by U.F. (p.4) ..." UF 10 (Schroder memorandum 6/6/35 attached to pages dated 8/26/35) "The objective is ... to give the Fruit Company working stock control of the Railways ..."

B92. One of United's purposes in insuring dominant control over IRCA was to assure its continuing control over the freight rates charged by IRCA. I

B93. The IRCA rates to be thus controlled by United included the rates paid by United to IRCA for the transportation of its bananas and goods. I

B94. The IRCA rates thus controlled by United included and affected the rates paid by competitors of United. U.R.

2. Schroder Is Aware of United's Control Objectives and Is Agreeable if Schroder and Its Friends Receive Something in Return.

B114. The arrangements with respect to the loan to IRCA by United, the bonds to be issued to United for said loan, the use by IRCA of the proceeds of said loan to redeem its 1941 maturity, and the issuance to United of the stock were embodied in a contract between IRCA and United's subsidiary, CAG, dated September 17, 1936, which was made expressly subject to the approval of IRCA's stockholders. T

B115. This contract was adopted by the Board of Directors of IRCA, which Board included directors representing Schroder, United and Fleming. T

B116. A letter dated September 25, 1936, was approved by the Board of Directors of IRCA and sent to the stockholders of IRCA soliciting their votes approving the contract of September 17, 1936, to be cast at a special meeting on November 4, 1936. T

B117. This proxy letter did not disclose to the stockholders that the issuance of 185,000 shares of IRCA common stock to United would give United voting control of IRCA, nor did it disclose United's intentions with respect to the use of that control concerning rates and management (See Findings B90-B96 above). T

B118. These facts and intentions were known to Schroder and United, to the directors representing them on the IRCA Board, and to Fleming. T

B121. The proxy letter further stated that in addition to the moneys to be received by IRCA from United as a loan and as the price of its unissued stock, IRCA would receive for its use in the banana traffic certain equipment (cars and locomotives) which would be purchased by CAG, thereby relieving IRCA of the capital expenditure for such rolling stock and of the possible future burden of a large investment in unnecessary equipment should the banana traffic decline. T

B122. This statement did not frankly state the facts since by an agreement companion to that submitted to the stockholders and which was not mentioned in the proxy letter, IRCA agreed to make the capital expenditure for this equipment by repaying to CAG the cost thereof at the rate of 5% per annum (amortization), with interest at the rate of 4% on the unexpired balance. T

B123. The proxy letter did not disclose to the stockholders that IRCA was obligated to make the capital expenditure for this equipment by repaying to CAG the cost thereof at the rate of 5% per annum (amortization), with interest at the rate of 4% on the unexpired balance. T

B124. This fact was known to the directors of IRCA. T

B125. The proxy letter further stated that in addition to the moneys to be received by IRCA from United as a loan and as the price of its unissued stock, IRCA would T

receive from CAG its promise not to build a port competing with IRCA on the Pacific side of Guatemala without IRCA's consent, a matter stated to be greatly in the interests of IRCA.

B126. This statement did not frankly state the facts. United had abandoned the idea of such port Schroder knew that United had no intention of building such a port and shipment over IRCA to Barrios was the sole means of transportation, adopted as matter of policy by United, by virtue of its control over IRCA. T

B127. The proxy letter did not disclose these matters to the stockholders. T

B128. These matters were known to Schroder and United, to the directors representing them, and to Fleming. T

B129. The contents of this proxy letter were determined by United. T

4. United's Domination Continues to be Accepted by the Bankers.

B132. When the 1936 stock transactions were completed Schroder acquiesced in United's demand that the voting trust of 1928 be dissolved in advance of its stipulated term. T

5. United's Stock an Actual Majority since 1936.

B146. The directors and officers of IRCA are aware that their tenure continues only at the pleasure of United. I

B147. Schroder and its nominees to the IRCA Board were aware I

> When the "(sic) the voting trust idea was abandoned, what it comes down to is dominant control of I.R.C.A. though not necessarily 51% control, by U.F. ..."

6. IRCA Policy has been to Conceal United's Dominant Control from its Stockholders

B148. United's dominant control over IRCA has not been disclosed to the public stockholders of IRCA. I

VI. IRCA OPERATIONS - SUPERVISION BY UNITED.

A. FREIGHT RATES AND SERVICE

B277. United has controlled and dominated, since 1928, the IRCA rates charged and the type of IRCA service rendered to shippers of bananas other than United (hereinafter called "independent shippers"), as is more fully described in Findings B301 et seq. below. U.R.

B278. United has controlled and dominated, since 1928, the IRCA rates charged to United and CAG as importers of goods into Guatemala, as is more fully described in Findings B378 et seq. below. I

E. BARRIOS PIER

B288. By the 1904 and subsequent contracts, United has obtained berthing and loading preferences for its ships at Puerto Barrios. U.R.

B289. The right side of the pier at Puerto Barrios is customarily reserved for United's ships; all other vessels, both banana and cargo vessels, berth at the left side. U.R.

B290. By the 1904 and subsequent contracts, United has obtained the right to perform itself the unloading of bananas from the cars and their loading aboard ship, and to maintain its own loading apparatus on the IRCA pier. U.R.

B291. United, since 1904, has performed its own unloading of bananas from cars and loading of same aboard ship, a service otherwise performed by IRCA for and charged to shippers of bananas. U.R.

B292. United, for many years, has maintained on IRCA's pier at Puerto Barrios large mechanical conveyors for loading bananas aboard ship, storage facilities for ship's tackle used in handling cargo from United ships, a timekeepers' office with respect to its labor gangs, and other facilities, all without payment to IRCA. U.R.

B293. Since at least 1928, United has directly supervised the controlled labor gangs on the pier at Puerto Barrios, including labor handling the non-United business of IRCA. U.R.

B295. The operations of the IRCA Barrios pier, the only deep water port of Guatemala were in respect of UFCo business under the control and domination of United, since at least 1930. U.R.

151A

VII. INDEPENDENT BANANA TRAFFIC SUPPRESSION AND DISCRIMINATION BY UNITED.

B301. At all times since 1904 it has been the policy of United to suppress the development of competitive production and purchasing of bananas in Guatemala for export. U.R.

B302. The largest single item of traffic over IRCA is and has been the movement of bananas from the growing areas to Puerto Barrios for export. U.R.

B303. Transportation of bananas over IRCA is and has been the only suitable means existing of moving the fruit from plantation to seaboard. U.R.

B304. Special facilities, service and handling are essential to the proper transportation of bananas by rail. U.R.

B305. United has sought and utilized its control and domination over IRCA to suppress competition in the banana business in Guatemala. U.R.

B306. United has since 1904, exercised influence over the IRCA rates charged and the IRCA services rendered to independent shippers of bananas. U.R.

B307. There has been no substantial actual competition to United in the Guatemalan banana business for over forty years after the founding of IRCA. U.R.

A. UNITED DISCRIMINATION VIA CONTRACTS WITH IRCA

B308. Since 1904, by its contracts with IRCA, United has required and does require IRCA to discriminate against competitors of United in the banana business. U.R.

(a) by withholding from such competitors the the special facilities and services afforded United;

B309. Since 1904, by its contracts with IRCA, United has required and does require that "the Railway Company will not encourage directly or indirectly any competition with the Fruit Company in the Republic of Guatemala" (1904 Contract, Par. 19). U.R.

B310. Since 1904, by its contracts with IRCA, United has required and does require IRCA to report in detail each month to United the quantity of all bananas shipped by others, the name of the shipper and the rate charged to such shipper. U.R.

B311. These contractual provisions concerning services and rates to, and non-encouragement of, any independent banana business in Guatemala apply to bananas wherever grown in Guatemala and shipped through whatever port, Atlantic or Pacific. U.R.

B. UNITED DISCRIMINATION VIA SUPERVISION OF IRCA RATES TO INDEPENDENTS

B313. United has advised on and influenced the rates to be set by IRCA for the transportation of bananas for independent shippers since at least 1928, in order to assure the maintenance of a discriminatory rate in United's favor and thereby to suppress competition. U.R.

B314. In the period prior to March 23, 1939, United arranged with IRCA President Myers and with Armstrong to ignore requests for the quotation of rates on export bananas and, at last resort, to quote only the maximum concession rates to prospective independent banana shippers, amounting to sums approximating $630 per car to Barrios. U.R.

B315. The officials of IRCA carried out this United policy by refusing to quote rates on export bananas to inquiring independent shippers and by quoting, when pressed, only the maximum rates. U.R.

B316. Such quotation of maximum rates was continued by IRCA in the interests of United even though this stimulated truck competition against IRCA, the trucks moving the independent bananas to Pacific ports and returning with imported and other goods, which goods otherwise would have moved over IRCA. L.R.

B317. The IRCA Board of Directors did not discuss the matter of quoting maximum rates to independents or whether IRCA could profitably handle such traffic at less than maximum rates; these matters were left to the operating officials to determine. L.R.

B318. On March 23, 1939, the IRCA Board, on the basis of Pollan's recommendation and advice, approved a new rate of $130 per carload, plus wharfage and switching charges, for the transportation of export bananas from western Guatemala to Puerto Barrios for independents, the same to be handled on regular trains. L.R.

B318a. When questioned about UFCO $60 rate IRCA "justified" its rate discriminations in favor of United on the ground of United's position as an "owner" of equipment and as a large stockholder of IRCA. L.R.

B319. Pollan, in his role as IRCA Special Advisor, advised IRCA to refuse bananas offered for transportation by independent shippers. L.R.

B320. Although IRCA is a common carrier, the operating officials of IRCA carried out this advice by Pollan. L.R.

B321. IRCA did not investigate or stimulate the prospect of independent banana traffic and made no effort to assist independent growers financially or otherwise. L.R.

B322. The IRCA Board of Directors made no investigation of the possibilities of existing, or potential independent banana traffic at the time of negotiation of contracts with United and did not consider the possibilities of such traffic in agreeing to the banana rates set in such contracts. L.R.

D. UNITED IS REGULARLY INFORMED ABOUT INDEPENDENTS BY IRCA

B323. IRCA has regularly informed United of inquiries and shipments by all persons seeking to move export bananas in Guatemala. U.R.

E. IRCA HAS REFUSED FACILITIES AND SERVICE TO INDEPENDENTS COMPARABLE TO THAT AFFORDED TO UNITED

B324. Until 1946, IRCA refused to furnish independent shippers with its special banana cars for the transportation of their fruit, despite the ownership of 349 such cars by IRCA and despite the fact that such special cars were necessary to the proper transportation of bananas; such cars were always furnished to United and CAG. U.R.

B325. Shortly after the new independent rate was fixed in 1939, United arranged to have IRCA remove its own ownership labels from IRCA's banana cars and to substitute the name of CAG, thereby giving the false appearance of United ownership and consequent unavailability to independents; all of IRCA's banana cars bore the CAG label until August, 1946. U.R.

B326. Until 1946, IRCA refused to furnish independent shippers extra train service for the transportation of their fruit, requiring them to move on ordinary trains despite the fact that such special service was necessary to the proper transportation of bananas; such extra trains were always furnished to United and CAG. U.R.

B327. The fixing of the new independent rate in 1939 did not serve to stimulate independent shipment of bananas over IRCA because of its limitation to shipment in regular trains and because of IRCA's denial to shippers of the use of banana cars and extra train service. U.R.

B328. In 1944 a new government took office in Guatemala; with the end of World War II and the resumption of substantial ship movements to and from Guatemala, the government evidenced an active interest in the welfare of independent shippers of bananas. U.R.

B329. Because of this growing government interest, IRCA feared and informed UFCo it feared that further denials of transportation service by IRCA to independents would result in government imposition of a restrictive quota upon the amount to be shipped by United, in an effort to make equipment available to the independent. U.R.

B330. IRCA then decided to furnish the independent shippers with some banana cars and special train service in order to avert drastic government interference with United's operation; the CAG labels were removed from IRCA's own banana cars. U.R.

B331. Accordingly, a quota system was adopted by IRCA in the allocation of its own banana cars and locomotives, which provided first for the complete filling of all the transportation requirements of United and CAG and then the division of the remaining balance of available equipment, if any, among the independents. U.R.

B332. Because of United's requirements, in 1946 and thereafter, IRCA frequently did not furnish cars to independents or did not deliver all they ordered, resulting in complaint of substantial loss of fruit and other damage to the independents. U.R.

B333. Upon United's advice, IRCA has refused to spot empty banana cars or pick up loaded banana cars on private rail tracks of independents leading from IRCA's main line into the independent plantations; IRCA has regularly spotted and picked up banana cars on the private rail tracks of United and CAG. U.R.

B334. IRCA refused to guarantee the regular service sought by independents, even when offered in return a guaranteed payment to made regardless of whether the cars are used or not; IRCA is bound to United and CAG by contract to render and does render guaranteed service. U.R.

B335. Prior to the present litigation, IRCA refused to permit independents to install loading conveyors on the IRCA pier, although required for efficient volume operations. U.R.

B346. By the terms of the 1904 contract, United availed itself of various special privileges and preferences, including the following:

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(a) United received 50,000 acres of land belonging to IRCA without paying therefor;

(b) IRCA was to transport all bananas tendered by United at such times and places as designated by United, in special cars constructed to United's satisfaction, running in special trains having right of way over all traffic other than scheduled passenger trains; no obligation was imposed on United to ship any bananas except such as United decided, in its sole discretion, to export from Guatemala and United was not required to export any bananas;

(c) Loading of bananas into IRCA's cars was to be under the control and direction of United, with right in United to keep on IRCA property any apparatus designated by United for that purpose; IRCA was to obtain for United the right to build such branch lines as United required for its bananas and IRCA was to receive bananas for transportation on such branches without extra charge, as well as at regular stations and at any other places along its lines;

(d) IRCA was to transport United's bananas to Puerto Barrios within 24 hours after the time specified by United when United would commence loading, regardless of the absence of IRCA control over the loading process;

(e) Unloading of bananas at Barrios from IRCA cars was to be under the direction and control of United, with right in United to keep on the IRCA pier, wharf and property any apparatus designated by United for that purpose;

(f) Preferential berthing was to be given to United banana ships at all times to coincide with the arrival of carloads of bananas;

(g) United was to pay 7-10 cents per stem, half the rate paid by others for such transportation;

(h) The special facilities, special cars, special trains, special loading and unloading arrangements etc. were to be afforded to United only, and to no one else without United permission;

(i) IRCA was obligated not to encourage directly or indirectly, any competition to United in Guatemala, without regard to the volume of traffic such competition might produce for IRCA.

(j) United was to receive detailed reports on the movement by IRCA of bananas for any other shipper.

(k) No provision was made in the contract for any changes in the stipulated rates to be paid by United to IRCA, regardless of the long duration of the contract and such changes in IRCA's costs as might eventuate in time.

B348. On August 1, 1913, a further agreement between IRCA and United was entered into, granting to United a

999 year renewable lease, rent free, on 67,392 more acres of land owned by IRCA, the land to be fully conveyed by IRCA to United on the removal of certain conveyance problems.

B349. On September 15, 1913, an agreement supplementing the 1904 contract was entered into between IRCA and United, reference to the terms of which (PX 8) is made as if the same were set forth at length in these Findings; this so-called Supplemental Traffic Agreement, apart from certain minor modifications of the 1904 contract:

(a) Slightly increased the rate to be paid by United to 11½ cents so that the same became a little over one-half of the rate required to be charged by IRCA to others;

(b) Reduced the maximum permissible time for delivery by IRCA of loaded cars to Barrios to 8 hours after completion of loading;

(c) Required IRCA to grant preferential berthing to United non-banana ships whenever practicable.

B350. A companion agreement of September 15, 1913, also required IRCA to construct branch lines for United over United's property, to be paid for by United at IRCA's cost.

B351. In 1920, by informal agreement, the rate per stem to United was increased to 15⅓ cents.

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B370. In order to maintain the appearance that United was furnishing the equipment necessary for the movement of its Pacific bananas, such letter arrangement for repayment by IRCA of the cost of this equipment was kept secret by various devices, including the following:

(a) No mention whatsoever of such repayment was made in any of the formal contracts executed by the parties in 1936;

(b) No disclosure of any such repayment was made in Myers' formal letter of recommendation to the Board Chairman or in the proxy letter from IRCA to the stockholders;

(c) Title to the equipment was to remain at all times in CAG even after IRCA had fully repaid to CAG the entire cost of that equipment;

(d) The payments made by IRCA for such equipment have never appeared as such on the books of account of IRCA; prior to 1947, they were concealed in that CAG paid IRCA the net amounts due IRCA for banana transportation after first deducting such equipment payments, IRCA in turn crediting such net receipts in its general freight revenue accounts without further identification; after 1947, such payments by IRCA were charged under its "General Expenses" account rather than as equipment expenses.

(e) No mention whatsoever of such repayment arrangement was made in memoranda, prepared by United or under United supervision, for issuance by IRCA to its stockholders, the Government or the public 'explanatory' of the IRCA-CAG arrangements.

(f) IRCA stockholders, now plaintiffs herein, seeking to ascertain the facts concerning the United-IRCA relationship were denied access to this letter agreement.

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D. 1936 TRACKAGE AND OPERATING AGREEMENTS (PX 16 17, 18)

B371. The purchase of this equipment by United, to be paid for by IRCA, was of substantial benefit to United in that it was intended to, and did, permit United to liquidate a substantial amount of its balances of blocked German marks via purchase of such equipment in Germany. I

E. 1946 IMPORT RATE AGREEMENT (PX 19)

B378. On September 17, 1936, CAG and IRCA entered into a letter agreement fixing a transportation rate of $60 per car for the movement from Puerto Barrios to western Guatemala of imported materials, supplies and equipment to be used for the construction and development of new plantations by CAG. Reference is made to the terms of that letter agreement (PX 19) as if set forth at length in these Findings. I

B379. It was understood that such transportation should be made, primarily in the empty banana cars returning to western Guatemala after delivering CAG fruit at Barrios. I

B380. After 1936, IRCA transported imported materials, supplies and equipment for CAG primarily in box cars having a capacity of 20 tons (as against the 12 ton capacity of banana cars); the $60 rate was charged CAG by IRCA for such larger cars and a reduced rate of $36 was charged for banana cars, and such rates applied to carloads where the contents were used either for the construction and development of new plantations or in the operation of existing plantations by CAG. Such charges were fixed by the operating officials of IRCA without action of the Board of Directors of IRCA. I

B381. After 1936 IRCA also transported such imported materials, supplies and equipment in such cars and at said rates for use by CAG in improving the existing plantations of others, who were under contract with CAG to sell their bananas to CAG; such charges were fixed by the operating officials of IRCA without action by the Board of IRCA. I

B382. The regular tariff charges paid by the public for comparable carloads were at least $350 per car for similar hauls. I

B383. Because of the preferential character of the CAG import rates, the IRCA officials desired to keep them secret. I

B384. With the increase in independent banana traffic after World War II and the interest of the Guatemala government in fair treatment for all shippers over IRCA, Bradshaw became concerned lest this disparity between the public rate and the CAG rate be discovered and used as a lever to force a reduction in IRCA's import tariffs. I

B385. Accordingly, an adjustment was worked out between CAG and IRCA, under which the CAG import rates would be increased and, at the same time, other United-CAG obligations to IRCA would be decreased in order that CAG's net obligations to IRCA would not be expanded. I

B386. In fact, the proposed adjustments involved a substantial benefit to United, despite the proposed increase in the CAG import rates. I

B387. These adjustments were embodied in a series of letter agreements between the parties dated July 1, 1946. Reference is made to the terms of such agreements (PX 26, 27, 28, 29) as if set forth at length in these Findings. I

B388. The effect of these agreements was actually to reduce the payments made by CAG to IRCA for CAG's imports since the small increase in the special rates to CAG was overbalanced by including within such special rates all CAG imports of materials, supplies and equipment, whether or not intended for construction and development. I

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DIVISION D

FAIR CHARGES ON BANANA TRAFFIC

I. ON CAG SHIPMENTS OF BANANAS

A. COMPARABLE PAYMENTS, SELLING PRICES, AND IRCA COSTS

4. Rates Charged by IRCA on Other Shipments of Bananas from West to Barrios Show Unfairness of CAG Special Rate and Fairness of Geoghegan Opinion Rate.

(c) Charges of Over $400 Per Carload Quoted to Independents, 1935-1939, With United Approval.

D32. Between May 3, 1935 and March 23, 1939, it was the policy of IRCA to quote rates to shippers other than United, on bananas from western Guatemala to Puerto Barrios, of over $400 for ten tons of bananas. T

D33. Such quotations were made after consultation with, and with the approval of, United officials. T

(d) Charges to Independent Shippers of Bananas to Barrios Since 1939.

D34. Under date of March 28, 1939, IRCA issued a rate order quoting a rate of $130 on bananas for export via Puerto Barrios from Retalhuleu, Santa Maria, Escuintla and points on the San Jose branch of IRCA. From points west of Retalhuleu as far as Ocos and Ayutla the rates under the order were proportionately higher. The rates under the order were based on the use of IRCA locomotives and cars and on the transportation of bananas in regularly scheduled trains. In addition to the $130 rate per car IRCA charged additional amounts for wharfage, switching and other services. T

D35. Under a rate order dated May 10, 1939, the maximum number of stems per car at the quoted tariff was 320 stems. T

D36. These line haul and wharfage charges on independent shipments of bananas for export were fixed with the advice and consent of Pollan, Special Adviser to IRCA and Executive Vice President of United. T

D38. The independent banana rate was installed and maintained to deter public criticism and government intervention in behalf of independents. At the same time to "protect" CAG traffic, IRCA discriminated against independents in service. T

(f) Movement of Independent Bananas in Volume Since 1945.

D45. Commencing in 1945 loading was permitted on sidings not at regular stations, and special cars and extra trains were made available for independent banana shipments for export. U.R.

D46. Independent bananas for export, at the said charges by IRCA, have moved in substantial volume in each year since, and including 1945. U.R.

(g) Banana Shippers' Ability to Pay.

D48. Independent shippers paid IRCA up to $200 per carload for the line haul after World War II. U.R.

(h) Comparison of IRCA's Service to CAG and to Independents and Extra Charges to Independents.

(1) Assignment of Equipment.

D49. In times of shortage, CAG has been given preference over all other banana shippers in the assignment of cars. U.R.

(2) Line-Haul Service.

D50. The service required in transporting export bananas from western Guatemala to Puerto Barrios, apart from terminal services at either end of the haul and station stops, is substantially the same whether transported for CAG or for an independent shipper. U.R.

D51. Agricola bananas and independent bananas have the same area of origin, namely various points tributary to the lines of IRCA between Santa Maria and Ayutla on the Pacific coast of Guatemala. U.R.

D52. Both Agricola bananas and independent bananas are shipped to Puerto Barrios, en route to the United States Gulf and Eastern ports. U.R.

D56. During the period since Oct. 1, 1945 to date the line haul rate of $130 to independents (shippers other than CAG) on carloads of bananas moved in special cars of 12 ton capacity from western Guatemala to Barrios, has been charged independently of the weight of the bananas per car, the number of stems per car, the number of cars per train or the point of origin on the west coast. U.R.

D57. During the whole period since October 26, 1932 the special contract rate to CAG, on carloads of bananas moved in special cars of 12 ton capacity from western Guatemala to Barrios, has been charged independently of the weight of the bananas per car, the number of stems per car, the number of cars per train, or the point of origin on the west coast. U.R.

D58. During the period, 1936 to 1954, 37.6 percent of the bananas shipped over IRCA by CAG from western Guatemala were not produced by CAG but were purchased by CAG from Guatemalan farms located at various places along the lines of IRCA on the west coast of Guatemala. U.R.

D59. CAG has to date paid the same amounts for transportation on purchased bananas as it did for bananas produced at its Tiquisate plantations. U.R.

D60. Bananas generally sell on a pound basis. U.R.

(3) Terminal Service.

D61. The cost to IRCA of the terminal service apart from labor costs of loading and unloading at Barrios, at origin and destination, is a very small proportion of the cost to IRCA of the entire banana transportation service to independents and CAG. U.R.

a. At Origin.

D62. At point of origin IRCA spots empty cars, and picks them up loaded, in substantially the same fashion for shipments of independents and of CAG purchased bananas. L-R.

D63. Since 1946, IRCA has taken trains of empties onto CAG lines and loaded banana trains off said lines, some ten miles away from its main line. IRCA also lends CAG two locomotives for the latter's spotting and assembly work. L-R.

D64. Prior to 1946, IRCA also spotted empty cars and assembled loaded trains, on the CAG lines. For about 1½ years, during 1944-1946, IRCA also did the dispatching on CAG lines. L-R.

D65. In 1946 it was agreed that CAG take over the car distribution and pick-up service on its Tiquisate plantation lines in consideration of various undertakings by IRCA other than adjustments in the banana rate. L-R.

D67. As part of the service of transporting bananas for CAG at the rates specified in the various contracts between IRCA and CAG, IRCA ran "feeder" trains between Mazatenango and independently operated farms on the San Felipe branch of IRCA to bring cars of CAG purchased fruit to Mazatenango, there to be joined to trains hauling other CAG bananas. L-R.

D68. In addition to the $130 per car charge made to independent shippers for hauling bananas from western Guatemala to Barrios, an extra $50 charge was made to these independent shippers for running a feeder train along the San Felipe branch to pick up cars of bananas. L-R.

D69. The difference in cost to IRCA of terminal services, at origin, for independent and for CAG export banana shipments via Barrios, is insignificant. L-R.

b. At Barrios.

D70. The CAG contract charge included such terminal services as the use of IRCA's Barrios wharf for unloading bananas from the cars and for loading them aboard ship, switching of loaded cars onto the wharf, and switching the emptied cars off the wharf. L-R.

D71. The $130 charge to independents did not include the use of the wharf at Puerto Barrios for unloading L-R.

bananas from cars or for loading them aboard ship; or the switching of the loaded cars onto the wharf; or the switching of the empty cars off the wharf. These and other services on the wharf were covered by separate charges.

D72. The difference in cost to IRCA of the service to independents and to CAG, at Barrios (except for various labor costs on which IRCA makes separate charges to independents and which CAG performs for its own account) is insignificant. U.R.

D72a. The segregation of produced and purchased bananas by CAG at Barrios caused additional difficulties and expense for IRCA. U.R.

D73. IRCA is the owner and operator of the Barrios wharf. U.R.

D74. The Barrios wharf is a valuable piece of property. U.R.

D75. IRCA is entitled to a fair return on its investment in the wharf at Barrios. U.R.

D76. IRCA undertook "at all times" to "provide convenient and suitable berth alongside its pier at Puerto Barrios for any and all vessels engaged in carrying bananas for the Fruit Company" and to "give a preference to . . . all vessels owned, operated or employed by the Fruit Company". U.R.

D77. The north side of the Barrios pier was reserved almost exclusively for the use of United's ships. U.R.

D78. IRCA undertook to "allow the use of such machinery, apparatus and mechanical devices in handling said bananas as shall from time to time be designated U.R.

by the Fruit Company and all such apparatus, machinery and devices shall whenever necessary be placed upon and kept on the premises, wharves and piers of the Railway Company for use in handling the said bananas as shall be designated by the Fruit Company".

D79. United owns and uses conveyors, tracks, a timekeeper's office and a storage shed for ships on the Barrios pier for which IRCA makes no separate charge. L/R.

D80. Shippers of bananas, other than United and CAG, pay IRCA a $3 per ton wharfage charge. L/R.

D81. The $3 per ton wharfage charge on bananas applies in part to the use of the pier at Barrios. L/R.

D82. CAG and United on banana exports make no wharfage payments to IRCA for use of the pier at Barrios. L/R.

D83. The wharfage charge of $3 per ton on bananas was a fair charge. L/R.

D84. The profits IRCA made on the $3 per ton wharfage charge were fair. L/R

D85. Shippers of bananas other than United and CAG never unloaded their own bananas from IRCA cars at Barrios. L/R.

D86. United (including CAG) performed, for its own account, the operation of unloading bananas from the cars, loading aboard ship and cleaning the pier. L/R.

D87. The cost per car to IRCA and to United to take the bananas from the car to alongside ship has been about the same. L/R.

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D88. The operation of unloading the cars of bananas at the wharf and loading aboard ship, for United and independents, is identical except for the mechanical conveyors. U.R.

D89. Many United (and CAG) bananas are loaded without use of the mechanical conveyors, just as are independent bananas. U.R.

D90. The cost to IRCA of loading independent bananas from alongside ship to the ship itself is charged separately to the ship or to the shipper; (it is not included in the $130 line haul or $3 per ton wharfage charge). Said cost is figured at direct labor cost plus a surcharge. U.R.

D91. The labor cost surcharges made by IRCA on ship and wharf labor billed on independent bananas are as follows: U.R.

For the period prior to June 30, 1948—10%
For the period July 1, 1948—November 30, 1949—25%
For the period Dec. 1, 1949—May 31, 1953—40%
For the period June 1, 1953—Dec. 31, 1954—43%
For the period Jan. 1, 1955 to date—45%

D92. IRCA's said labor cost surcharges on independent bananas included a profit. U.R.

D93. The overtime labor cost incurred by IRCA in unloading independent bananas is charged separately to the shipper or the ship operator; (it is not included in the $130 line haul or $3 per ton wharfage charge). U.R.

D94. The regular time labor cost incurred by IRCA in unloading independent bananas is charged separately to the shipper or ship operator; (it is not included in the $130 line haul or $3 per ton wharfage charge). U.R.

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D97. The reasonable unloading labor cost per car of bananas (direct, regular time labor cost plus surcharge thereon plus wharf cleaning) has been as follows:

LR.

Period	Detail	Cost
1945	16 men at .30 per hr. (1½ hrs.)	$ 7.20
	10% surcharge	.72
	Cleaning wharf	.05
	Total	$ 7.97
1946–6/30/48	16 men at .35 per hr. (1½ hrs.)	$ 8.40
	10% surcharge	.84
	Cleaning wharf	.05
	Total	$ 9.29
7/1/48–11/30/49	16 men at .35 per hr. (1½ hrs.)	$ 8.40
	25% surcharge	2.10
	Cleaning wharf	.10
	Total	$10.60
12/1/49–5/30/53	16 men at .525 per car	$ 8.40
	40% surcharge	3.36
	Cleaning wharf	.10
	Total	$11.86
6/1/53–12/31/54	16 men at .525 per car	$ 8.40
	43% surcharge	3.61
	Cleaning wharf	.10
	Total	$12.11
1/1/55 to date	16 men at .525 per car	$ 8.40
	45% surcharge	3.78
	Cleaning wharf	.10
	Total	$12.28

D99. The $3 per ton wharfage charge computed on a per car basis, on CAG carloadings, less the reasonable per car unloading labor cost, would be as follows: LI-R.

(1) Period	(2) Wharfage	(3) Unloading Cost	(4) Difference
1943	25.50	7.97	17.53
1944	28.20	7.97	20.23
1945	26.70	7.97	18.73
1946	31.80	9.29	22.51
1947	32.10	9.29	22.81
1/1/48- 6/30/48	33.00	9.29	23.71
7/1/48-12/31/48	33.00	10.60	22.40
1/1/49-11/30/49	31.80	10.60	21.20
12/1/49-12/31/49	31.80	11.86	19.94
1950	31.50	11.86	19.64
1951	33.90	11.86	22.04
1952	31.20	11.86	19.34
1/1/53- 5/30/53	32.10	11.86	20.24
6/1/53-12/31/53	32.10	12.11	19.99
1954	32.10	12.11	19.99
1955 to date	32.10	12.28	19.82

(4) IRCA's Services to CAG, Without Separate Charge, Over and Above Services Required of a Common Carrier.

D100. Under the contracts, the terms of which govern the haulage of CAG bananas from western Guatemala, the charge made to CAG for the haulage of its bananas includes the supplying by IRCA of all advantages and facilities provided for in the various agreements between the companies. LI-R.

D101. The $60 charge for hauling bananas from western Guatemala to Barrios, when contracted for in 1933, covered the supplying by IRCA of the following listed advantages and facilities to CAG: LI-R.

(a) IRCA undertook to return, free of charge, all banana pick-up gangs, banana receivers, checkers, counter checkers, and others employed by CAG in connection with the picking up and receiving of bananas from any point on its main line to the point where the said gangs and employees started.

(b) IRCA undertook to supply CAG fuel oil at cost.

(c) IRCA undertook not to plant any bananas or go into competition in any way directly or indirectly with CAG in its business in the Republic of Guatemala during the existence of the contract; and IRCA further undertook not to encourage directly or indirectly any competition with CAG in the Republic of Guatemala during the contract.

(d) IRCA undertook to use in the CAG service cars satisfactory in construction to CAG, and to

give CAG trains the right of way and precedence over all other trains and traffic excepting only passenger trains.

(e) IRCA undertook to permit CAG to maintain on its premises any equipment designated by CAG used in handling bananas.

(f) IRCA undertook to grant and to obtain for CAG the necessary rights and privileges for the construction of transportation facilities necessary to the development of the CAG banana business.

(g) IRCA undertook to furnish CAG each month with a statement in detail showing the amount and size of all bunches of bananas carried by it during the prior month and for whom the same were carried and the amount of freight rates charged by it for such carriage.

(h) IRCA undertook at all times to provide convenient and suitable berth alongside its pier at Puerto Barrios for any and all vessels engaged in carrying bananas for CAG.

(i) IRCA undertook to transport all bananas tendered by CAG for transportation to Barrios from western Guatemala with no corresponding obligation on CAG to ship any given amount of bananas over IRCA at the rates specified in the contracts.

(j) IRCA undertook to transport CAG bananas to Barrios from western Guatemala within 24 hours from the completion of loading thereof by CAG.

(k) IRCA undertook not to charge rates, or furnish facilities, to outside interests which would

encourage competition with CAG without the consent of CAG.

(l) IRCA undertook to furnish wharfage service as a part of the line haul service for CAG without additional charge.

D102. In substance the various undertakings of IRCA set forth in the preceding finding continue in effect to date. L-R.

D103. The various undertakings of IRCA set forth in Finding D101 were over and above its obligations to public shippers as a common carrier. L-R.

D104. The various contracts defining the terms of the haulage of CAG bananas from western Guatemala to Barrios stated and made known to IRCA management the special treatment to be given CAG. L-R.

(i) Payments to IRCA on Independent Banana Traffic via Barrios are the Minimum, and are Below the Fair Rates, on the CAG Banana Traffic.

D106. A CAG rate lower than the independent banana rate is not warranted by differences in cost to IRCA of rendering same. L-R.

D109. The natural consequence of charging CAG less than the public, for the haulage of bananas from western Guatemala, was to deter shipments of bananas competitive to CAG. L-R.

D112. Under the law of Guatemala, United is barred from setting up permanent banana rates over IRCA of a discriminatory nature in favor of CAG and to the prejudice of other shippers. L-R.

6. Railroad Rates on Banana Traffic in the United States Show Unfairness of CAG Special Rate and Fairness of Geoghegan Opinion Rate.

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(c) Comparison Between IRCA and U.S. Railroad Revenue Needs.

D167. For the period 1944 through September 30, 1951, CAG bananas accounted for about 30.5% of IRCA's Guatemala Division total gross ton miles. T

D172. Prominent among these features are the following: U.R.

(a) Bananas are perishable, making imperative a careful, expedited service.

(b) IRCA transportation operations are coordinated with CAG's harvesting operations at origin and with United's banana vessels at port.

(c) CAG banana traffic fluctuates widely from day to day, week to week, month to month, and year to year.

2. Whether a Port at Concepcion Would be Helpful or Hurtful to IRCA, a Proposed Port thereis no Facto in the Fair Rate on CAG Shipments to Barrios.

(c) On Assumptions That a Port at Concepcion in United's Hands Would Adversely Affect IRCA and That United Planned to Build Such a Port, United Control Over IRCA Disabled IRCA from Taking Effective Counter-Measures.

D226. Since 1904, IRCA contracts with United had required IRCA to discourage independent banana traffic and disabled IRCA from taking practical measures to encourage independent banana traffic. U.R.

D227. In practice IRCA discouraged independent banana traffic in the interest of United and with the advice and consultation of United officials. U.R.

D228. Zemurray, United's head offical, emphasized the importance of United's control over IRCA to prevent IRCA from encouraging banana competition. U.R.

3. Concepcion Not a Factor in Light of United States Anti-Trust Policy Governing Panama Canal.

D248. The port defense assumes that the CAG bananas could either have gone directly to west coast US ports or through the Panama Canal to the Atlantic and Gulf markets or that, in substitution therefor, an equivalent amount of bananas could have gone from western Costa Rica and Panama through the Panama Canal to the said markets. Accordingly, the port defense assumes availability of the Panama Canal to United banana vessels. L.R.

D251. Since the U. S. has been the primary market for Guatemalan bananas, shipment of bananas in Guatemala for export is part of the import trade of the United States. L.R.

D255. Without the availability of the Panama Canal, the use of Concepcion would add to an excessive supply of bananas on the Pacific side and aggravate a shortage on the Atlantic side. L.R.

4. Circumstances Preceding Acquisition of Tiquisate Property Show That Possibility of Alternative Route Not Important Element in Plans of United to Develop Western Guatemalan Bananas.

D272. The course of events prior to United's acquisition of the Tiquisate property shows that in making said purchase United was in fact relying on the Barrios route and control over it, and not any alleged Concepcion route. L.R.

5. The Alleged Concepcion Route Not an Available Alternative, in Light of the Circumstances Respecting the West Coast Contract with the Government of Guatemala and its Modification.

D273. On June 6, 1931 Guatemalan President Ubico ordered published and executed a contract between the Government and CAG. This concession was known as the "West Coast Contract." L.R.

D274. At the time of the West Coast contract between United (CAG) and Guatemala, United had no authoritative reports from its engineers that adequate port facilities for handling bananas could be built at Conception del Mar. L.R.

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D278. In consideration of United's undertaking to build a public service port at Concepcion del Mar the government granted United (CAG) the concessions set forth in Article 16 (paragraphs a through h) of the West Coast Contract. U.R.

D279. These concessions included, among other things, exemption from import duties on materials for the building of railroad lines and drainage and irrigation facilities (paragraph (a)); exemption from the payment of any other taxes than those specified in sub-paragraphs (a), (b), (c), (d) and (e) of Article 14, and from increases in the specified taxes (paragraph (e)); the right to build, maintain and operate within the confines of its properties railroad lines and to connect such lines with IRCA (paragraph (f)); the right to establish, maintain, and operate within its properties telephonic and telegraphic lines and other systems of communication (paragraph (g)); and, without prejudice to the rights of third parties, the right to the necessary use of available water for irrigation, the right to construct dams, dykes, canals, ditches, aqueducts, wells and all works necessary for irrigation, drainage, and other systems necessary for the operation of the company, and the right to cross its roads, bridges, aqueducts, and railroad lines over national rivers (paragraph (h)). U.R.

D280. Independently of the portions of the West Coast contract dealing with the construction of a port, the concessions were deemed essential by United to an extensive development of the west coast of Guatemala. U.R.

D289. In February, 1934, Zemurray, of United, told Myers, of IRCA, that he (Zemurray) wanted to start immediately developing the Fruit company properties on the West Coast of Guatemala and to encourage plantings on private properties; that he (Zemurray) expected United to be moving at least 5,000,000 stems annually from the Pacific Coast through Barrios within the next five years; and that before taking any definite action he (Zemurray) required that the obligation of United to construct a port be changed to a right to build, or that the time limit be extended twenty-five years. U.R.

D290. In March 1936, United's obligation to build a port on the Pacific was changed into a right to build. U.R.

D291. Under the modified West Coast contract with the Guatemalan Government United undertook within two years to enter into additional contracts for the purchase of bananas, which if available would, together with existing contracts, total 3,500,000 stems annually. U.R.

D295. The course of events with respect to the West Coast contract and its modification is inconsistent with any alleged serious intent by United to build a port at Concepcion as the major outlet for its banana operations. L.R.

6. No Sound Engineering Opinion that Construction and Maintenance of a Port at Concepcion Would be Feasible and Practicable and Meet Both United's Banana Business Requirements and the Conditions of the West Coast Contract with the Government.

D318. Fruit has never had sufficient data as to the cost of any of the proposals to build a port to enable it to make a prudent decision to built a port, in the light of the large investment that would be involved and the existing route via Barrios to United's main markets in the United States and Europe. L.R.

D344. The evidence and data were insufficient upon which to base a sound engineering opinion that a port at Concepcion was feasible or practicable. L.R.

D346. The evidence is insufficient to show that a port could be constructed under reasonable conditions in accordance with sound engineering practice and economic wisdom at Concepcion del Mar that would satisfy both the requirements of the West Coast Contract (UF 111, the West Coast Contract, 12/9/30), Article I, and the requirements of the banana business for preferential treatment with respect to berthing space. L.R.

7. Special Rate to United (CAG) was not, in Negotiations and in Contracts, Based on Alleged Port as Alternative Available to United or on Prevention of Alleged Harmful Consequences of such a Port.

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D360. The contract, dated September 17, 1936, in evidence as PX 25, was the only one submitted in the letter seeking proxies to the stockholders of IRCA for ratification at the Special Stockholders Meeting held on November 4, 1936. L.R.

D364. By the said agreement (PX 25), IRCA agreed to give CAG 185,000 shares of IRCA's capital stock and a note. L.R.

D365. Said transfer by IRCA was in exchange for the promise not to construct a port at Concepcion unless consented to by IRCA, and for the remaining considerations mentioned in that agreement. L.R.

8. Alleged Proposed Port at Concepcion Does Not Warrant Special Rate, Since IRCA was, at all Times, Regarded by United as Vital to its Western Guatemala Banana Business.

(b) That Proposed Port at Concepcion Was Not Available Alternative, Was United's Real Position in the Discussions Leading to the 1936 Agreements.

D385. In the letter dated May 31, 1935 (UF5), Mr. Simpson, Chairman of the IRCA Board, reported to his London banking colleagues, that, with respect to its Atlantic operation, United could conceivably without great difficulty construct a line of its own to seaboard; that, with regard to the Pacific properties, the situation is entirely different; that bananas moving to Puerto Barrios will be carried in some instances a distance of 300 miles, from sea level to an elevation of 5,000 feet and down to sea level again, and that IRCA is vital to this business, since the sea route is for various reasons less advantageous. L.R.

D387. IRCA at all times has been vital to the CAG banana business. T

D388. On June 14, 1928, during negotiations between banking interests and United concerning the acquisition of a large amount of IRCA stock from Minor C. Keith, B. W. Palmer, Chairman of the United Executive Committee, wrote to London interests involved in the negotiations, that United could not "safely pursue a program of development of the banana industry in Guatemala unless United owned voting control or such control were lodged firmly in the hands of friends." T

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D390. During the negotiations leading up to the 1936 agreements, United officials were of the opinion that United must at all hazards guard itself against the possibility of antagonistic interests attaining a dominant position in IRCA and using that position on behalf of rival banana interests; and that satisfactory settlement of this question was a *sine qua non* to the development of the Pacific properties. T

D391. United considered that control over IRCA and the IRCA-owned route to Barrios were essential to it. This negatives the claim that Concepcion provided an alternative. T

D392. In connection with the negotiation of the 1936 agreements, Simpson, IRCA Chairman, cabled his London associates on May 16, 1935 of United's desire of "absolute assurance transportation facilities in order justify heavy expenditures Pacific Coast banana development." T

D393. The Concepcion route did not afford the required "absolute assurance [of] transportation facilities." T

D395. The combination Zemurray sought was the western development with the IRCA Barrios outlet, not said development with a Concepcion outlet. U.R.

D396. About May 23, 1935 United officials informed Simpson that United required "control over rates charged by IRCA." The reference was particularly to banana rates. U.R.

D399. On May 31, 1935 Simpson advised his London associates that IRCA was "vital to this business", namely, United's business of banana production in the West as a source of supply to the "greatest" consumption areas in the East, "since the sea route is for various reasons less advantageous." U.R.

D400. By way of Concepcion and the Panama Canal, Tiquisate bananas are about 3 to 4 days further away from the great Atlantic and Gulf markets than by land-water via Barrios. U.R.

D401. On May 31, 1935 Simpson advised his London associates that United was "deeply concerned about . . . future rate relations between IRCA and other possible growers and shippers of bananas . . . What troubles the United Fruit Co. is the possibility at some future date IRCA may by its rate policy toward others favor the growth of hostile competition." LIR.

D402. United officials emphasized to all concerned, during the discussions leading up to the acquisition of 185,000 shares of IRCA stock by United, that United could not afford to make a big investment in western Guatemala, with the grave danger that IRCA would be controlled by others, who might put United at a very substantial disadvantage through discriminatory rates and treatment. LIR.

D404. The Concepcion route was incompatible with the CAG banana business in the Atlantic and Gulf markets. LIR.

(c) Avoidance of Competition in the Western United States Markets as Deterrent to United to Building and Operating a Port at Concepcion.

D405. The port at Concepcion, if built, was required to be a public port. LIR.

D406. On December 21, 1926 a United official reported to Mr. Cutter, President of United, that if the available area for bananas on the west coast of Guatemala was as reported, there was a chance of "the banana market being swamped." LIR.

D408. In a letter dated May 21, 1932 H. T. Heyl, United manager in Guatemala, wrote A. A. Pollan, of United, concerning a contract to be entered into with IRCA covering the right to transport bananas over the tracks of that company from the junction of the Main Line and the Los Angeles tramway to the port of San Jose on the Pacific Coast of Guatemala. Mr. Heyl stated in the letter, that it might be well to delay signing the contract, that the only fruit handled over the tram line, LIR.

and which would be subject to the 3 cent rate, is that of Berger Brothers; that with the abandonment of the Los Angeles farm the Berger fruit would be the only fruit handled at the three cent rate; that Pollan consider handling the Berger fruit, in the event of shipments from San Jose, on the same basis as all the other west coast fruit, namely, 15 cents per stem and have the Railroad refund the difference in New York, or privately in Guatemala City; that a 3 cent rate over the tracks of the Railway might at some future time make independent shipments look attractive to Berger, while a 15 cent rate might prove a damper to such a plan; that he [Heyl] is reliably advised that Berger had stated that if conditions were good at the expiration of his contract he would ship independently to California; and that in the light of Heyl's then understanding of conditions on the Pacific Coast, United refrain from creating a 3 cent rate on bananas, especially as the bananas are those of a person who has successfully dabbled in independent exportation.

D409. On August 10, 1932 Pollan wrote Heyl that he (Pollan) would follow Heyl's suggestion and postpone the contract covering shipments of bananas from Los Angeles farm to San Jose. U.R.

D412. During May and June of 1936 quotations of rates on bananas from Pacific points to the Pacific port of Champerico were sought by persons unaffiliated with United. U.R.

D413. As of June 16, 1936 IRCA had not quoted rates in response to said inquiries. U.R.

D414. Whitbeck, of IRCA, told Jarrold, of IRCA, that if Jarrold eventually had to quote a rate, to apply the maximum export rate of $102. per car, minimum 20,000 pounds, San Antonio to Champerico. U.R.

D415. Heyl, of United, was informed orally by Whitbeck, of said requests for rates on June 17, 1936. U.R.

D416. On December 27, 1938 Porter King, of the IRCA traffic department, reported on a request by a Sr. Alfonso de la Cerda for rates on bananas, Coatepeque to Champerico, for export to California ports. U.R.

D417. On the same day as the King report (PX 851), Armstrong, of IRCA, telephoned Shepardson, of IRCA, informing him of the request for rates by de la Cerda, stating that maximum rates were being quoted, and instructing Shepardson to advise Myers for handling with United. U.R.

D418. On the day following the King report (PX 851), Armstrong wrote to Heyl, of United, assuring him that IRCA would make no reduction in rates to de la Cerda. U.R.

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D419. On January 2, 1939 Myers wrote Shepardson concerning the request by de la Cerda for rates stating "that maximum tariffs must be quoted in such cases and that nothing else could be done." L/R.

D420. On January 3, 1939 Shepardson reported to Myers, then in California, that he (Shepardson) had been in touch with Pollan by telephone concerning de la Cerda's request for rates, and that Pollan had stated that Armstrong was taking the only possible course, and that Armstrong should be impressed with the importance of "staying put." L/R.

D421. On January 3, 1939 Shepardson wrote Armstrong concerning PX 853 stating that Pollan had stated that he (Armstrong) should adhere to the position expressed by Armstrong in PX 853. L/R.

D422. PX 854A was circulated among top IRCA personnel to be initialed by them on January 7, 1939. L/R.

D423. On March 4, 1939 Armstrong reported to Shepardson (PX 217) that a Ricardo Davila Ruiz had asked for rates on shipments of bananas from West Coast points to San Jose and Champerico (as well as to Puerto Barrios) and had been quoted maximum rates. Armstrong also stated that he had advised Heyl of the matter by telephone, was sending Heyl a copy of PX 217, and was enclosing an additional copy of PX 217 for delivery to Pollan at Heyl's request. L/R.

D424. On March 14, 1939 A. A. Pollan, Executive Vice-President of United, wrote Armstrong stating, with respect to the matters set forth in PX 217, that "Mr. Armstrong has taken the right stand and I don't see that there is anything else he can do at the moment." L/R.

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D425. On March 14, 1939 a copy of a memorandum was sent by IRCA officials to Mr. Heyl, of United, in which it was stated that a man believed to represent the Standard Fruit Company was making inquiries through the Guatemalan Government on IRCA's rates on bananas from [illegible] to various ports in Guatemala. It was further stated that IRCA would quote no rates unless pressed to do so and if so pressed would quote maximums. L·R

D426. Standard Fruit Company is a large competitor of United in the sale of bananas in the United States. L·R.

D427. Upon receiving a report dated October 18, 1939 stating that Grace & Co. contemplated purchasing and shipping 40,000 stems per week out of Champerico, Jack Armstrong, President of IRCA, told Mr. Lewis, of IRCA, that "Perhaps Mr. King could ask Mr. Kidder discreetly as to what this means. I want to show this to Mr. Taillon." L·R.

D428. On November 8, 1939 Mr. King in a memorandum to Mr. Armstrong, both of IRCA, reported on a proposal by a Sr. Encarnacion Abularach to ship bananas to California via San Jose, and requested that he be permitted to quote rates on the proposed movement below maximum rates permitted under the concessions, in order to prevent the commencement of highway competition. Mr. King further stated the "maintenance of rail rates has not curbed banana exports by independents via Champerico." L·R.

D429. On the margin of PX 222 Armstrong noted that Taillon (of United) would "come in Friday morning 10th Nov." L·R.

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D430. On November 9, 1939 Armstrong instructed King to refrain from quoting rates lower than maximums to independents on proposed shipments to west coast ports. U.R.

D431. By November, 1939 IRCA was already quoting rates to independents well below maximums for the haul between west coast ports and Barrios. U.R.

D432. In a letter dated December 7, 1939 (PX 984B), Armstrong reported that he had discussed with Mr. Taillon, of United, the competitive banana shipments through Champerico and the subsequent threat of a similar situation through the port of San Jose; that he had stressed the danger to IRCA of high railroad rates on bananas to west coast ports encouraging trucking competition; and that "we" had never thought of reducing those rates, but "shall maintain our tariff rates absolutely." Mr. Armstrong requested a copy of the letter be sent to Mr. Pollan. U.R.

D433. On December 13, 1939 A. A. Pollan informed Shepardson that he (Pollan) wished to talk with Shepardson concerning PX 984B. U.R.

D434. On March 15, 1940 Porter King, General Freight and Passenger Agent of IRCA, reported that the export of bananas by independents via Champerico had not stopped; that as long as IRCA declined to handle the bananas, it was in reality promoting trucking competition to and from the port and losing revenue it might otherwise receive; and that IRCA had not retarded the banana movement, but by not handling it had lost revenue on local freight and import traffic. U.R.

D435. Concerning PX 223C, Mr. Armstrong, President of IRCA, stated in a note (PX 223A) to Mr. Lewis of U.R.

IRCA, that "we" discussed this fully some time ago with Taillon and I think also with Turnbull; that "we" put up the same arguments then as we are putting up now; that there is a much broader aspect to this question than one of fostering a possible freight movement by truck from Champerico, and that "I don't feel that I can put it up to UF Co. who have made sacrifices to stop this movement."

D436. On March 7, 1941 Keough, of IRCA, reported that the "Peyre brothers" sought cooperation from IRCA with respect to the proposed production of 500,000 stems of bananas yearly to be transported through San Jose to the West Coast of the United States, and which were to be planted, maintained, irrigated and sprayed without the assistance of United. L-R.

D437. Armstrong, IRCA President, directed that a copy of the Keough report (PX 1074) be sent to Heyl, of United, under confidential cover. L-R.

D438. On March 27, 1941 Keough reported that he had a further discussion with the Peyre brother "who manages the San Victor farm" and who again mentioned the subject of transporting bananas independently of United through San Jose to the extent of 500,000 stems annually. Keough reported that he was non-committal about the subject. L-R.

D439. A copy of the March 27, 1941 Keough report (PX 1076) was sent to Heyl, of United. L-R.

D443. On a carload basis approximately 90 percent of the bananas sold in United's western sales division of the United States are sold by United as opposed to the 10 percent sold by its competitors. L-R.

D444. During the period 1950 to 1954, practically no competitive fruit was sold in United's western division of the United States which had been imported through United States west coast ports. L-R.

D445. The price on United bananas sold at ports of entry on the west coast of the United States is based mainly on the price of United bananas sold at ports of entry on the Gulf coast of the United States plus rail costs into United's western division. L-R.

D446. The evidence does not show the price on United bananas sold at ports of entry on the west coast of the United States is based on any competition from bananas shipped in through the west coast ports of the United States. L-R.

D447. The sales price per 100 pounds of United's bananas sold in the Western Division of the United States, over the sales price per 100 pounds of United bananas sold in the Eastern Division of the United States, resulted in revenues to United aggregating $28,835,619 on its total Western Division banana sales for the period 1935 through 1954. L-R.

D452. The 1936 agreements between IRCA and CAG included a special equipment arrangement whereby title to equipment used by IRCA was retained permanently by CAG. The fact that IRCA was required to pay CAG for said equipment was not disclosed in the letter to the stockholders requesting ratification of the main agreement of 1936. The fact that such payments were being made was concealed on the books of IRCA from 1937 to about January 1, 1946. From about 1939 to about 1946, IRCA and CAG put CAG ownership insignia on IRCA-owned banana cars. I

D477. By virtue of all the aforesaid circumstances, and all the evidence in the record the CAG banana rates have been unfairly low at all times since January 1, 1946. T

II. ON UNITED BANANA SHIPMENTS FROM EASTERN GUATEMALA

A. Bananera Rate Since February 13, 1943, Is Same as That Fixed for United in 1913; Lower Than That Fixed for Independents in 1913; and Lower Than That Paid by United in 1920's

D485. Since at least 1908, substantial amounts of export bananas have been moved by IRCA for United from eastern Guatemala to Barrios. T

D486. The rate set for said transportation by the 1913 agreement (PX 8) was 11½ cents per stem for United and 20 cents per stem for other shippers. IRCA was required by the 1904 contract (PX 4) not to encourage independent shipments. T

D487. The rate to United included the supplying of all cars, advantages and facilities provided for in the agreement and was in lieu of all wharfage, switching and other charges. T

D488. The intent of the 1904 and 1913 agreements (PX 4 and PX 8) was to assure to the Guatemala Railway Co. (IRCA) the transportation of bananas produced for export T

in Guatemala tributary to its lines, and to assure to United the acquisition of such bananas through production by itself or purchase from farmers.

D489. Since 1908, United has continuously bought bananas produced by others in eastern Guatemala and shipped them over IRCA to Barrios. There have been no substantial independent shipments from eastern Guatemala. T

D490. During the period 1908 to 1954, inclusive, approximately 27 percent of the bananas shipped over IRCA by United, and originating in eastern Guatemala, have been bananas purchased by United from farmers. T

D491. In 1920, the United rate was increased to 15⅓ cents per stem. T

D492. For each year 1932 through 1947, the rate on the haulage of United bananas originating in eastern Guatemala was either 12 cents or 11½ cents, depending on whether the total United Shipments to Barrios, including west coast fruit, totaled less than or more than 7,000,000 stems. T

D493. Since 1948, the rate on the haulage of bananas for United from eastern Guatemala to Barrios, including the placing of the bananas alongside steamer on the wharf at Puerto Barrios, has been 11½ cents regardless of volume. T

D494. The rate on the transportation to Barrios of United bananas originating in eastern Guatemala has included the supplying of all cars, advantages and facilities provided for in the various agreements between United and IRCA with no separate charge for wharfage, switching or any said services. T

B. IRCA Per Car Revenues from Bananera Traffic Too Low as Shown by Under Loadings

D495. Under agreement between United and IRCA in effect since February 3, 1933, United was, in connection with the per stem rate charged it, under obligation to use its best efforts to obtain a minimum average loading per month on shipments from the Atlantic side to Puerto Barrios of 320 stems per banana car consistent with United's standard practices with respect to the loading and transportation of bananas.

T

D500. Between 1943 and 1951, the stems per carload of said United shipments ranged between 219 and 284, averaging 244. Between 1952 and 1955, the said stems per car were 317, 264, 262, and 251. The average for the entire period was 248.

T

D501. Between 1943 and 1951, the tons per carload of said United shipments ranged between 6.29 and 9.95, averaging 7.17. The banana cars had a capacity of 12 tons.

T

E. Charges on Independent Shipments Post World War II

D511. Following World War II, there were some carload independent banana shipments from eastern Guatemala. They were charged at $72 per carload plus $3 per ton wharfage.

T

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DIVISION E

FAIR CHARGE ON IMPORT SHIPMENTS OF UNITED AND CAG

I. RATES PAID; IMPORT TARIFF RATES ARE FAIR RATES.

E1. The 1936 agreements provided that IRCA would charge CAG $60. per carload for the transportation of materials, including equipment and supplies, imported by CAG for construction of new railroad lines and irrigation works and for the development of new banana plantations and their appurtenances. I

E2. Said $60. carload rate was largely based on the use of the empty banana cars returning to Western Guatemala after delivering CAG fruit at Barrios. I

E3. Whenever banana cars are held in Barrios or Tiquisate to load or unload import freight, the cars are not available to the Pacific fruit service. I

E4. In practice, only a small portion of the total CAG import freight has moved in banana cars. I

E5. In practice, a substantial portion of the CAG imports consisted of materials for other than construction and development but carried the same charges as materials imported by CAG for new railways or development of banana farms. I

E6. CAG's special carload rate has also been charged on imports to farms that were under contract with CAG. I

E7. CAG's special carload rate has been applied irrespective of the destination of the materials in Guatemala-West (*e.g.* San Sebastian, Coatepeque, Casa Blanca, I

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Auyon, Retalhuleu, Xata, Buena Vista, Patulul, Chitalon, San Felipe, Nazatenango, Gutalon, San Antonio, Variedades, Santa Rosa, Quipquil and Tiquisate).

E8. CAG has obtained the special carload rates regardless of the physical character of the import item (excluding merchandise for resale). I

E9. CAG has obtained the special carload rates regardless of the number of import items included in the same carload. I

E10. CAG has obtained the special carload rates even though loaded at times in excess of the rated capacity of the car. I

E11. CAG has obtained the special carload rates regardless of the ownership of the equipment. I

E12. The $60. import rate was adjusted in 1939, through Pollan's personal intervention, to apply to CAG imports hauled in 20 ton freight cars; for CAG imports in 12 ton banana cars and 25 ton freight cars, the rates were set at $36. and $75. respectively. I

E13. Said changes were not submitted to the IRCA board of directors for approval. I

E14. Armstrong, when President of IRCA, had expressed fear of the consequences to IRCA if the said import rates to CAG became generally known in Guatemala. I

E15. After Bradshaw became President, in a memorandum sent to United officials, he expressed similar apprehensions of the effect of the CAG import rates. I

E16. In this memorandum, Bradshaw pointed out that at the rate of $60. for a 40,000 pound freight car to move I.

CAG import freight from Barrios to Tiquisate, IRCA was not covering actual cost.

E17. In this same memorandum, Bradshaw pointed out that, in contrast to the $60. rate on CAG import shipments, IRCA was charging the public, for similar movements of import traffic, $350. or more per carload. I

E18. The rates on CAG import traffic were revised in 1946. I

E19. The effect of the 1946 changes was to reduce overall the charges IRCA had the right to make for hauling CAG imports. I

E20. The 1946 contract rates on CAG imports applied regardless of whether the materials hauled were for construction and development, or for maintenance. I

E21. The 1946 contract rates were extended to cover CAG movements from Bananera and Quirigua, as well as from Barrios, to Tiquisate. I

E22. The 1946 changes involved a net gain to United. I

E23. The IRCA Board was not advised that this was the net effect of the 1946 revisions. I

E24. Import traffic for shippers other than UFCo has been and is carried in volume by IRCA at IRCA's published tariff rates for both transportation and wharfage. I

E25. Under the law of Guatemala, IRCA is prohibited from discriminating among shippers generally on import transportation and wharfage rates. I

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II. CAG MATERIAL IMPORTS AND THE IRCA IMPORT TRANSPORTATION TARIFF RATES.

E29. The contract rates set in 1946 for carrying CAG materials from Barrios, Bananera or Quirigua to Tiquisate or other points on the Pacific coast served by IRCA are the following: I

Banana Car (24,000 pounds) $48.00 per carload
Freight Car (40,000 pounds) $100.00 per carload
Freigh Car (50,000 pounds) $125.00 per carload

E30. The special rates on CAG import materials were and are very much below the published tariff rates of IRCA for the transportation of the particular items of material imported by CAG. I

E31. On imported commodities on which IRCA has a tariff rate per hundred pounds where the tariff does not indicate whether its application is to a carload or to a less than carload shipment, the tariff is applicable to both carload and less than carload shipments. I

E32. Among the materials imported by CAG at the special rates were general materials from Barrios to Tiquisate. I

E33. The import tariff rate on general mixed materials from Barrios to Tiquisate is $1.00 per hundred pounds. I

E34. CAG imported materials, other than general materials, from Barrios to Tiquisate and other stations in Western Guatemala, at the special rates. I

E35. For such shipments to Tiquisate of the commodities listed below, the tariff rate is correctly stated in PX 4069-A and B as follows: I

Banana Props	2/14/43-12/31/55	$1.025 per 100 lbs.
Copper Sulphate	2/14/43- 6/30/47	.715 per 100 lbs.
Copper Sulphate	7/ 1/47-10/ 9/49	.61 per 100 lbs.
Copper Sulphate	10/10/49-12/31/55	.64 per 100 lbs.
Mattresses	7/ 1/47-12/31/55	1.22 per 100 lbs.

IV. CAG AND UNITED IMPORTS AND IRCA IMPORT WHARFAGE RATES.

E52. The wharfage tariff charge on imports covers, in part, the use of the pier; this is a valuable right. I

C. Materials.

E66. United and CAG paid an amount less than the general wharfage tariff rate on materials imported by said companies. I

II. BULK OF EXPORT-IMPORT TRAFFIC FLOWS THROUGH BARRIOS, ON UNITED SHIPS.

F22. During the post-World War II period to date, approximately 70 per cent of Guatemala imports and 90 per cent of exported coffee, annually transported via Barrios, were carried by United steamships. U.R.

F23. The great bulk of Guatemalan coffee destined for the United States via United States Gulf and Atlantic ports, after World War II, moved through Barrios. U.R.

F24. Prior to World War II, practically all Guatemalan exports and imports which moved via Barrios to and from U. S. ports were transported in United's vessels. U.R.

III. JOINT ENDEAVOR BY IRCA AND UNITED TO ENCOURAGE TRAFFIC THROUGH BARRIOS, AND ON UNITED SHIPS.

F26. IRCA and United have, since some time prior to 1929, closely cooperated to cause IRCA's import-export traffic to be diverted to the Barrios route via IRCA and United ocean steamers. U.R.

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F101. The financial burden of the 1933 reduction in the total ocean, port and rail rates via Barrios was, and continues to be, borne only by IRCA. U.R.

VII. UNITED, AS BENEFICIARY OF JOINT PROGRAM TO MEET POTENTIAL TRUCKING COMPETITION, UNFAIRLY ENRICHED ITSELF IN NOT SHARING COST OF THAT PROGRAM.

F103. IRCA's rates have, since at least 1928, been designed to divert traffic to the Barrios route. This program has in part at least been carried out under the influence of and in the interest of United. U.R.

F107. Said burden of meeting the potential trucking competition on the west coast to encourage use of the Barrios route continues to be borne by IRCA. U.R.

F108. At the time of the said 1933 downward adjustment in IRCA's tariffs and at all times to date, no attempt on the part of IRCA or United management has been undertaken to cause United, as the principal carrier out of Barrios, to share in the continued burden of meeting potential trucking competition, in order to encourage use of the Barrios route. U.R.

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OPINION

COPY

U.S. DISTRICT COURT
FILED
JAN 29 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

-against-

UNITED BRANDS COMPANY,

Defendant.

- X

#41825

65 Civ. 479

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

-against-

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

- X

72 Civ. 649

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GURFEIN, Circuit Judge (sitting by designation):

This is an opinion after trial on the issues of liability alone. An earlier opinion on the motion for summary judgment by the defendants stated the history of the litigation between the parties and the claims in the present complaint. International Railways of Central America v. United Brands Co. and Compania Agricola de Guatemala, 358 F. Supp. 1363 (S.D.N.Y. 1973).[1] The summary judgment motion was denied, but partial summary judgment was granted dismissing the antitrust claims for acts committed before February 16, 1961; and dismissing the contract claims against United Brands ("UB"), formerly United Fruit Company ("UF") for breaches committed after December 31, 1962 (contract expiration date) and before January 1, 1961. With respect to breaches of contract claimed against Compania Agricola de Guatemala ("CAG") they were dismissed if committed after December 31, 1962 (contract expiration date) and before October 9, 1962.

The case was tried to the Court without a jury with the applicable statutory recovery period for alleged antitrust violations designated as only from February 16, 1961;

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and for alleged contract violations against UB between January 1, 1961 and December 31, 1962.[2] Detailed findings of fact are being filed herewith.

To restate the issues briefly:

International Railways of Central America ("IRCA"), the plaintiff, was dominated for many years by UF which was its controlling stockholder and which also controlled its Board of Directors.[3] UF is, and has been, for more than half a century in the business of producing, buying and transporting bananas for the purpose of importing them into the United States, as well as other countries. CAG, a wholly-owned subsidiary of UF, owned and operated banana plantations in western Guatemala in an area around Tiquisate. IRCA was a railway in Central America which, among other things, carried bananas in Guatemala from the east coast to the seaboard Port of Barrios on the Atlantic Ocean for UF and from the west coast to Barrios for UF's wholly-owned subsidiary, CAG, as shippers.

As will appear, UF sold its stock in IRCA, save for 100 shares, in January, 1962.[4] The Guatemalan Government seized IRCA's assets in 1969 for alleged default on

a Government loan. The corporate entity remained and is the present plaintiff.

The surviving antitrust claims in this litigation are:

First Claim: that UF's repressive tactics prevented other banana shippers from using IRCA's railroad facilities from February 16, 1961 to December 31, 1961, in violation of Sherman Act Section 1 (15 U.S.C. § 1).

Third Claim: that UF restricted its own banana shipments over IRCA from February 16, 1961 to 1964, and disposed of its Tiquisate banana plantations (on the west coast of Guatemala) in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

Sixth Claim: that acquisition of control of IRCA by UF was in violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

Earlier Proceedings

Beginning in February, 1949, certain shareholders of IRCA had begun a derivative suit against UF in the New York

Supreme Court charging that UF had breached its fiduciary duty to IRCA.[5] In 1956, the Supreme Court so held and awarded a judgment for over $4.5 million for the period before 1956, and ordered an increase in freight rates prospectively to the termination of the contracts. In March 1961 a supplemental judgment awarded IRCA close to $5 million more, representing the increased rates from January 1956 through December 1960, which had been accrued but not yet paid pending the outcome of the appeal. The New York Court of Appeals affirmed the judgment, 8 N.Y. 2d 430 in 1960, and finally denied rehearing on February 23, 1961, 9 N.Y. 2d 758. The full amount of the judgment was then paid.

After collecting the $8.5 million from UF, IRCA retained some of the able attorneys who had succeeded in the first action to sue in the Federal Court claiming antitrust violations and breaches of contract. The action was begun on February 16, 1965 -- four years after the final order of the New York Court of Appeals.[6]

In the meantime, the United States had started a civil antitrust suit against UF in 1956 which resulted in a consent decree in 1958.

UF moved to dismiss the present claims as barred because of the prohibition against the splitting of causes of action and on the ground that they were barred by the statute of limitations. On the antitrust claims this court (Ryan, Ch.J.) dismissed the complaint on the antitrust claims, finding that there had been a splitting of the causes of action because "the facts presented to the New York court in the Ripley case were substantially the same as those presented by this litigation." 254 F. Supp. 233, 237 (S.D.N.Y. 1966).

The Court of Appeals for the Second Circuit disagreed that there had been a splitting of the causes of action: "[s]ince the Ripley complaint did not and could not properly have asserted a claim under the federal antitrust laws [since the New York courts do not have jurisdiction to determine such issues] the judgment cannot have adjudicated that UF violated them." 373 F.2d 408, 419 (2 Cir. 1967), cert. denied, 387 U.S. 921 (1967).

The Court of Appeals affirmed the District Court's finding that the Statute of Limitations barred suits for antitrust

violations committed before February 16, 1961, which is the law of the case.

Six years after the Court of Appeals' decision, UF (now UB) moved for summary judgment as related above. On the antitrust claims it argued that IRCA had no standing to sue. In the opinion mentioned above, 358 F. Supp. 1363, this Court held, as indicated, that there were issues of fact to explore which prevented summary judgment for the defendant without a trial of the issues. The Court said:

> "The gravamen of the present claim that survives the limitations defense is that UF then [after the Ripley decision] turned upon IRCA as reprisal for its insistence on the fulfillment of the Ripley judgment and aimed its antitrust violations at IRCA as a direct and prime target. It is said to have cut is banana production on the West Coast for the purpose of laying IRCA low, and to have restricted the use of its Tiquisate land for banana growing not only to thwart its potential competition but also for the avowed purpose of directly harming IRCA." 358 F. Supp. at 1372-73.

To understand this reference, a brief statement about Tiquisate is in order at this point. UF's subsidiary CAG operated banana plantations on the west coast of Guatemala in an area called Tiquisate from the 1920's to

1963 or 1964. All the bananas grown or purchased by CAG on the west coast were transported to Barrios via IRCA. The claim with respect to standing which was principally considered on the summary judgment motion, was that UF had deliberately abandoned Tiquisate in reprisal against the Ripley judgment and against IRCA's refusal to lower the freight rates provided therein.

While I based my opinion denying summary judgment primarily on the disputed issues of fact concerning the alleged abandonment of Tiquisate, I did not finally determine whether IRCA had standing on its other theories. UB had contended that since IRCA was not its competitor, its alleged antitrust violations were directed against others than IRCA, and that any harm to IRCA was merely of incidental effect.

On the trial, resourceful counsel for the plaintiff did not limit their antitrust claim to the Tiquisate abandonment and its consequences. Instead, they have sought to take full advantage of the decision of our Court of Appeals that they had not split their cause of action.

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Accordingly, they have contended that UF was in a conspiracy with its subsidiary, CAG, to restrain trade for many years -- going back a half century -- and that some of this restraint continued into the period after February 16, 1961. They also contend that certain acts committed before February 16, 1961 had an effect after that date because the damages were allegedly not calculable at any time before the statute had run. The plaintiffs contend that such damages are recoverable despite the claimed bar of the statute under the doctrine of Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

The defendant takes sharp issue on these claims, urging that conditions of alleged control and domination had so changed by 1961 that no carryover of antitrust violation (if it ever existed) can be presumed and that the plaintiff has failed to prove such control and domination. It asserts further that Zenith, supra, has no bearing because, in any event, there were no pre-1961 damages that were incalculable at the time and have become calculable since. It contends also that the plaintiff has failed to show any causal connection between any pre-1961 act and an impact therefrom after February 16, 1961.

Changes in Relationship

With the statutory limitation of February 16, 1961 in mind, let us review the changes that had occurred by that date in the relationship of UF to CAG to IRCA. I noted in the earlier opinion, 358 F. Supp. at 1367, that the New York Court of Appeals had affirmed the Referee's decision requiring UF to pay higher rates to IRCA for transportation of bananas, $130 per car, a rate equal to that charged its competitors, in 1960; and that the United States had obtained a consent decree against UF in 1958, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. Judge Ryan had found, and our Court of Appeals did not disagree, that, since 1959 IRCA had had several independent directors who had the requisite knowledge to bring suit against UF for antitrust violations. 7/

By February 16, 1961 the control of IRCA by UF had been dissipated. While it still owned the IRCA stock which was not sold until January, 1962, it was required under the consent decree to divest itself of the IRCA stock by 1966. I find that the IRCA board was independent

UF by February 16, 1961. At the May 1961 IRCA stockholders' meeting, UF did not vote its shares. The freight rates on banana transportation were governed by the Ripley judgment.

The consent decree, in Paragraph VI(A)(9), prohibited contracts between UF and IRCA requiring IRCA to discriminate against other shippers. Counsel for IRCA, UF and the Ripley plaintiffs independently studied the contracts and found no language requiring discrimination that should be abrogated.[8/] We shall deal later with the claim that IRCA in fact was compelled to discriminate against Standard Fruit ("Standard"), UF's only competitor in Guatemala.

The conclusion of counsel that there were no clauses requiring IRCA to discriminate would have had to be wrong if "discrimination" actually continued, since, if the contracts themselves did not require it, there was no proof adduced that the IRCA board was subservient enough in the statutory recovery period to take orders from UF or CAG. On the contrary, since we know from Judge Ryan's finding that there had been at least three

independent directors since 1959, one would expect to find any discriminatory act of the IRCA Board resulting from domination by UF to have met with their articulated dissent. The IRCA Board Minutes are in evidence (DX 552) but they show no instance of a split vote on rates or practices.

The Factual Issues

Among the factual matters to explore on the antitrust phase of the case are, therefore, (A) whether UF caused IRCA to discriminate against UF's competitors or potential competitors to the detriment of IRCA and (B) whether Tiquisate's termination (and its operation in the statutory period) were for the purpose of suppressing competition in the import of bananas into the United States and to harm IRCA in reprisal for Ripley; or whether, as the defendant contends, the termination as well as the operation of Tiquisate were dictated by legitimate business considerations.

A. Alleged discrimination against other shippers and potential shippers

The gravamen of the Ripley complaint was that UF

had breached its fiduciary duty to IRCA by insisting upon a large differential in the freight rate for banana shipments on the line haul from the west coast to Puerto Barrios which was charged to UF and which was charged to competitors to the great advantage of UF and to the detriment of IRCA.

In this case, the plaintiff is not claiming any discrimination in the rates paid on the line haul after February 16, 1961 (P. Answering Memo "PAM" p. 11).[9] There is good reason for the concession.[10] The line haul rates were fixed for the period from 1956 to the end of the contract by the Ripley court and complied with by the defendant. I have previously found the termination date of the contract involved to have been January 1, 1963.

The claim, in this respect, reduces itself to claims (1) that alleged discrimination in rates before February 16, 1961 had injurious effects after 1961 and are compensable; (2) that certain other discriminatory charges, other than the line haul freight rate itself, continued as discriminatory action after February 16, 1961. These alleged discriminations are: (1) dock charges;

(2) total banana transportation costs; (3) import line haul rates; (4) wharfage on imports; (5) diesel oil freight rates; (6) practices at the pier. These very claims were essentially before the Ripley court on claims of unfairness. That court did not require any of the practices involved to be changed or compensated for.

With respect to these claims of discrimination in favor of UF against its competition, I find the following facts:

1. Dock charges

Both before and after 1961 CAG paid no wharfage charges to IRCA (which owned the wharf). CAG loaded and unloaded its ships at Barrios with its own labor. Standard, its competitor, was required to pay IRCA for the loading and unloading operations a wharfage fee of $3 per ton and a fee computed from the cost of IRCA's loading crews (Tr. 73;313). The plaintiff failed to call any of Standard's personnel as a witness.

The plaintiff has failed to prove that it did not cost CAG as much to load and unload as the charge paid by

ndard to IRCA for handling these operations. There is so no proof that Standard was arbitrarily denied, at the chest of CAG, the right to use its own labor in the process. There is evidence that Standard discussed this matter with IRCA in 1957. On July 2, 1957 the IRCA board adopted a resolution to advise Standard that IRCA would agree to eliminate wharfage and switching charges if satisfactory arrangements could be made with Standard's labor to take over the unloading. Nothing came of the suggestion for reasons not in evidence.

On March 15, 1971, by which time I find that the IRCA Board was independent of the defendant, the board was informed that Standard wanted a cancellation of the wharfage charge on export banana traffic. Again there is no evidence that anything further was done about it before Standard left Guatemala entirely as the result of a hurricane "blowdown" of its west coast plantations in November, 1961. Nor is there any evidence that UF had anything to do with the decision, whatever it may have been. I find that there is no evidence of discrimination on the wharfage charge. I

and further that it was essentially a loading and unloading charge rather than a separate charge for the use of the pier apart from its connection with the loading and unloading services performed by IRCA.

2. Total banana transportation costs

Standard was in business in Guatemala after February 16, 1961, but only until November of that year. During that period, as we have seen, UF was required under the Ripley judgment to pay the public tariff rates, which it did. Though the freight rate paid by both shippers was the same, the plaintiff contends that there was, nonetheless, a differential in favor of UF over Standard, because UF's so-called "banana loading expense" at Barrios for 1961 was $34.04 per car (DX 536 while Standard was paying IRCA $36 per car wharfage "plus at least $10 for loading aboard ship" (Tr. 424). Standard also had unspecified expense in running its own conveyors at Barrios (Tr. 157-60).

On the other hand, I find that IRCA rendered "spotting services" to Standard -- spotting its empty banana cars at locations on its banana farm (Tr. 1339-40)

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while CAG spotted its own cars at its own expense and turned their cars over to IRCA only at the junction at Rio Bravo. CAG operated its own 90 mile railway which it maintained and operated with its own locomotives and crews (Tr. 1338-39). Moreover, the line haul for Standard was 70 miles more each way than for CAG. I find that the differential claimed by plaintiff is not supported by adequate proof in view of the fact that IRCA rendered greater services to Standard than to IRCA. Plaintiff has failed adequately to establish these extra costs to CAG which would have to be part of the equation to make both sides equal.

C. Import line haul rates

The plaintiff contended that there was discrimination in freight rates going the other way -- on imports to the west coast. Plaintiff concedes that there was no such discrimination in the statutory recovery period. (PAM 117-118).

Under its contract CAG was required to "pay wharfage at the rate of $1.00 per ton in the case of import freight other than that which is for sale in the Company's stores which will be charged at $3.00 per ton" (PX 901, p.1). In any event, as plaintiff concedes "The only year in the statutory recovery period in which Standard was also importing materials was 1961" (PAM 119). There is no documentary proof of wharfage charges paid by others.

The testimony of Haase, president of IRCA, that the published tariff rate was higher than CAG's special contract rate (Tr.89; PAM 119) is not specific enough regarding applicable time periods to apply to the period from February 16, 1961 to November, 1961 when Standard ceased operations in Guatemala after a hurricane (Tr. 72; 212).

E. Diesel oil freight rates

Plaintiff claims that there was discrimination on the freight rate that IRCA charged CAG for transporting diesel oil. There is no evidence of whether the quantity of diesel oil imported by Standard on the east coast and

shipped to the west coast in the nine months of the statutory recovery period was of any significant amount. So far as the record shows, none may have been imported in the period in question. In any event, Haase, the only witness on the subject, was unable to point to the particular years when a differential existed (Tr. 388-89).

F. Practices at the pier

The IRCA pier at Puerto Barrios was used by both UF and Standard. UF used the north side of the pier where it had conveyors for lading and unloading its ships. Standard generally used the south side of the pier where it had placed its conveyors on an apron. Again we are talking only of the nine months during the statutory recovery period.

UF had installed its conveyors on the north side of the pier many years before Standard came to Guatemala. It should be noted that cargos other than bananas used other parts of the pier to avoid interference (Tr. 82).

Plaintiff contends that it was discriminatory for UF to have the north side of the pier, where the water was several feet deeper and could accommodate larger vessels, for itself. I find that there is no evidence that the ships used by Standard were too small for its purposes or that Standard ever asked for the privilege of using the north side of the pier. In the absence of any such evidence, the claim that the pier was used in discriminatory fashion during the statutory recovery period is sheer speculation.

G. Allocation of banana cars

There is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the West Coast. (Tr. 351). The plaintiff, however, does not complain "that IRCA suffered any damages on shipments made by Standard but that Standard's capacity to ship from Western Guatemala was not fully developed because of United's [UF's] anti-competitive and monopolistic practices." (PAM 125).

According to Haase, banana cars were apportioned to CAG on a preferential basis in the years 1960 and 1961 (Tr. 69-72). He conceded, however, that the

allocation of banana cars never caused Standard to miss a ship or a cutting and that the delay never exceeded 48 hours (Tr. 345-48). This does not evidence a horrendous situation where Standard simply could not plant and ship more bananas because of a shortage of banana cars. Haase believed that neither IRCA nor Standard ever suffered losses as a result of car allocations (Tr. 345-46; 411-12).

With respect to injury to the plaintiff, such evidence, if it existed, would relate not only to damages but to the question of injury itself. Without injury there could, at the threshold, be no standing to recover. See GAF v. Circle Floor Co., 463 F.2d 752 (2 Cir. 1972), and the discussion on summary judgment in this case at 358 F. Supp. 1370-73.

It is, thus, my conclusion that so far as the statutory recovery period is concerned, there was no

"continuing" discrimination into that period resulting either from (1) prior domination of IRCA by UF or from (2) contract provisions that survived into the statutory recovery period.

As the plaintiff properly suggests, "whether IRCA incurred injury after February 16, 1961 as a proximate result of United's [UF's] violations is, of course, a question of fact, e.g., Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 323; Highland Supply Corp. v. Reynolds Metal Co., 327 F.2d 725, 732 (C.A. 8)" (P.M. 45). (Emphasis added).

We shall consider whether there were violations of the antitrust laws which were not calculable in damages before 1961 but which became calculable in the statutory recovery period, after we consider the claims based on the abandonment of Tiquisate.

Third Claim

The Tiquisate banana growing operation was closed down in 1964 and the land sold by CAG. It is plaintiff's claim that this Western Guatemala operation was closed down

in reprisal for IRCA's refusal to lower the freight rate set by the New York courts as a "fair rate" and that when the land was sold it was deliberately kept from banana cultivation in order to suppress competition in the import of bananas into the United States and as further reprisal against IRCA for its obstinate refusal to reduce the rates.

It was primarily to enable the plaintiff to come forward with proof on these allegations that summary judgment for the defendants was denied.

The proof at the trial included testimony of Haase, former president of IRCA, and of Sunderland, former president of UF, as well as Van Diepen, Mason, and Fox, former officials of UF and CAG.

In addition, numerous exhibits were allowed in evidence. Each party has submitted proposed findings of fact, including findings related to the third claim.

Assuming, arguendo, that the relevant market for purposes of Section 2 of the Sherman Act is the importation of bananas into the United States solely from Guatemala, we must limn the scene as it existed in the early part of 1961 and shortly before.

The essential ingredients were: (1) CAG was now paying the freight rates on the long haul from Tiquisate to Barrios as ordered by the New York courts; (2) Sunderland had come to UF as President in November, 1959 (Tr. 662); (3) UF's earnings from its banana operations had declined from $58.6 million a year in 1950 to $7.2 million in 1959 (DX 135; Tr. 713-14); (4) A large element in the deterioration of the banana growing operation in Tiquisate was the spread of Panama disease which attacked the roots of banana plants and killed them (Tr. 670); areas infected with Panama disease had to be abandoned so far as cultivation of the common Gros Michel or Cocos type of banana was concerned (Tr. 1312); (5) another large element was the prevalence of "blow-downs," tropical storms which destroyed vast areas of Gros Michel plantings; (6) competition from Ecuador was increasing; (7) Sunderland was required to find a solution to the economic difficulties of the company as a whole.

Alongside these problems were two other considerations: (1) UF did not like the rate set by the Ripley court and maintained that it could not live with it and (2) the contract with IRCA, as the defendants read it and as this

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Court later concluded, 358 F. Supp. at 1374-76, was to expire on December 31, 1962, at which time a renegotiation of rates would be in order.

Such a renegotiation never actually got off the ground. Though UF pressed it several times, IRCA took the position, unwisely as it turned out, that the contract did not expire until December 31, 1967, that the contract stood under the Ripley judgment, and that it would not lower the rate set by the Ripley court.

IRCA's refusal to lower the rate was in the face of clear intimations by UF, as plaintiff has shown, that, as an alternative, the defendants might have to discontinue the Tiquisate operation. I find that there was no promise that if the rates were lowered satisfactorily Tiquisate would be continued indefinitely as a banana operation. IRCA was made aware of the natural problems of Tiquisate, excessive Panama disease, excessive blowdowns, and the special problems of the banana ripening process in the long haul from Tiquisate to the Atlantic Seaboard.

IRCA knew that serious decisions would have to be made about Tiquisate, but it refused to budge. The parties

were, of course, both inhibited before December 1, 1960 when the New York Court of Appeals rendered its decision, and, indeed, to February 23, 1961 when that court finally denied rehearing.

But, thereafter, by its inaction, IRCA made it evident that Sunderland would have to consider the freight rate set in the Ripley decision as an element in his final recommendation on Tiquisate. It is possible that if IRCA had been alert, as it should have been, to the obvious danger of its best customer leaving Guatemala, the negotiations for new rates would not have proceeded in such desultory fashion. Perhaps it was because IRCA was itself a monopoly, armed with a judicial decree on rates, that it assumed a position of power which it did not really possess. Great empires have been lost, and probably will be again, through miscalculation of one's own strength or adversary's weakness. I realize that the plaintiff can hardly be expected to adduce direct evidence on intention, even by way of binding contemporaneous memoranda and that it must rely largely on circumstantial evidence. I have taken that into consideration in evaluating the evidence

and sought inferences from such evidence as far as I conscientiously could, in favor of the plaintiff. On the other hand, the burden of establishing its case by a preponderance of the evidence rests on the plaintiff.

I have concluded that the plaintiff has failed to sustain that burden. The findings of fact establish that; but I think it may be appropriate to suggest the broad elements of that conclusion, perhaps somewhat discursively.

I recognize that it is possible that all the testimony and documentary evidence presented by the defendants in support of their position that Tiquisate was closed for legitimate business reasons could have been for the purpose of fabricating a fictitious excuse for the ultimate decision, as the plaintiff appears to contend. I must say, however, that I was impressed with the sincerity of Mr. Sunderland and the other UF witnesses. They testified lucidly about the difficult problems they were facing in the 1959 - 1964 periods, difficulties which arose independently of the Ripley lawsuit. In general, I credit their testimony as supporting the legitimate motive in abandoning the Tiquisate operation in favor of other operations in other countries and in Eastern Guatemala.

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Enough has been shown about the hazards of banana growing in the tropics to enable the court to follow the course of decision taken by Sunderland and his board. By way of general synopsis, I have found that the very period which coincided with the affirmance of the Ripley judgment ushered in a new era in banana cultivation. In essence, the struggle was against the forces of nature rather than against the Ripley court.

The conventional banana was the Gros Michel which had been devastated by Panama disease and blowdowns (because of the height of the plant, making it more susceptible to wind damage). Sunderland, faced with a natural crisis, ordered detailed agronomic and financial studies to be made. If these studies coincided roughly with the affirmance of the Ripley judgment, they also coincided with the new presidency of Sunderland.

These studies showed that the solution was the development of a banana that would be resistant to Panama disease and would also grow shorter and be less susceptible to tropical windstorms. Ultimately, such a plant was successfully developed. It was called the Valery banana.

The basic weaknesses were small compared to its strengths. It was thin-skinned and had to be boxed before being transported. There was some doubt whether it could withstand long hauls up mountains and down valleys.

A significant counter-strength of the Valery was that it required less land for its cultivation than did the Gros Michel. This, in turn, led to the logical question of whether UF had too much land for present need, and, if so, in what areas should land be sold.

A sharp controversy has arisen between the parties on this question. UF has presented a mass of agronomic and financial evidence to establish that Tiquisate was a logical area to drop when the Valery banana came to the rescue of the Company because it was the worst of all UF's company-owned divisions in which to produce the Valery bananas. The Company also dropped other areas (Tr. 802, 869-70). Of the 1.36 million acres owned by the Company at the end of 1961, approximately one-third, or 422,701 acres were authorized for sale and disposal in twelve divisions (DX 530).

Aside from the agronomic and financial reasons, I also credit the political reason given, that the political

climate in Guatemala was bad, and that if land had to be disposed of, it would be safer not to have two major divisions, Eastern Guatemala and Western Guatemala, in that same country.

The plaintiff urges that it can be shown objectively that Tiquisate was not the worst division for growing the Valery. It has developed figures on landed cost to U.S. Gulf ports for boxed bananas. Its assumptions on the decreased costs for boxed bananas were challenged by Mr. Fox, the UF executive vice-president. But assuming that plaintiff's landed cost figures were accurate, there is no showing that Sunderland knew this, agreed with it, or had reason to doubt the Miller Report which showed Tiquisate to be the worst division. The plaintiff, to prevail on the issue of intent, would have to convince the court that the Miller Report and the other reports were contrived to reach a result. I am not convinced of that. I think the testimony concerning action taken on the basis of the reports was straightforward.

We are not in a situation where the objectively best division was reported as the worst. In short, I find no accumulation of circumstantial evidence preponderant

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enough to overcome the testimony and exhibits supporting the actions concerning Tiquisate as motivated by legitimate need and not by the Ripley judgment alone.

If the dominant purpose of UF had been to eliminate competition, it is paradoxical that its successive step decisions to abandon Tiquisate growing came mostly after its only competitor, Standard, left Guatemala in November, 1961. CAG did not get below about 50,000 acres of banana land until October 23, 1962 when it authorized the sale of 28,104 acres. This was about a year after Standard had left the country, apparently forever.

The Managers' Conference of September 4 and 5, 1962, was when it was decided to "phase out" the Tiquisate operation. This was almost a year after Standard left.

One must conclude that in seeking a lower rate for banana shipments, UF was not seeking a rate that was discriminatory, for there was no longer any actual competitor to discriminate against.

The next contention of the plaintiff, as I understood it, was that in selling the Tiquisate land, UF

deliberately restricted it from future banana cultivation, for the purpose of limiting its banana competition and as reprisal against IRCA. In denying summary judgment I wanted to give plaintiff a chance to prove these allegations. It has failed to do so, although its able counsel has been most ingenious in his efforts to do so.

Having determined that the closing of Tiquisate was legitimately motivated, we next come to the question of whether in the disposal of the land it acted in furtherance of monopolization. I leave to one side the question of whether UF by the 1960's was a monopoly or close to a monopoly, and assume, for the moment, that it was.

The first question is whether, in the deeds given to purchasers there was a restrictive covenant prohibiting the use of the land for banana cultivation. There was no general policy, although there were a few leases with such restriction. Second, were good faith efforts made to sell the land for banana cultivation? I find that the buyer's market was very small for the following reasons. The logical buyer, if, indeed, it wanted to go back to Western Guatemala after its blowdown experience of 1961, was Standard Fruit. But that was the one buyer, UF's largest competitor, to whom UF was not permitted under

the Consent Decree to sell divested land. The Government of Guatemala was not enthusiastic about bananas as the staple of its agriculture, as evidenced by the circumstance that it had ceased the cultivation of the 100,000 acres of banana land that UF had ceded to it some years before. This policy also tended to eliminate small landowners who could not count on Government support, which was more directed to the growing of cotton. Other active competitors in the banana business were in fact approached, and registered either lack of interest for agronomic reasons or because of a lack of capital to finance the large operation.

Finally, the plaintiff rests its principal argument that UF could have preserved Tiquisate as banana growing land on the suggestion that it could have made a deal with Roy O. Chalk, an entrepreneur, who in 1963 controlled IRCA. It is a popular adage that it takes two to tango. I find that Chalk was a reluctant dancing partner.

If there had been an offer from Chalk which the court could have found reasonable, there might have been an objective finding that a rejection by UF was ulterior in motive. Or if there had been affirmative

misrepresentations to Chalk, such as one finds in a Section 10(b)(5) case, the same result might have been reached.

The difficulty here was that Chalk, for his own good and no doubt honest reasons, was slippery in the negotiations. He wanted to buy cheap and that was his privilege. UF might, indeed, have been expected to bend a little to save the banana growing business, but the question is how much is enough. What Chalk wanted I fi[illegible] was unreasonable. Assuming that he was sincerely interested in making a deal, which one will never know, he apparently wanted to buy the Tiquisate land at $100 an acre (the upset price), get the equipment and plant for nothing, and buy it as a divestiture under the consent decree which would also require UF to sell him the appurtenances needed for a going business including a steamship fleet worth $5 million. He did not come up either with a total price or a means of independent financing. Under the antitrust consent decree it is doubtful whether the Department of Justice would have permitted UF to divest under the decree by taking back a substantial purchase money mortgage.

I find that the Chalk deal was remote rather than close and that the deterioration of the Chalk negotiations, as indicated by the findings of fact, were not the result of foot-dragging by UF.

Once the decision to close down Tiquisate was made it would have been quixotic to hold the land for a longer time in the extremely remote hope that someone would appear as a purchaser for banana cultivation.

Yet, there is the last argument that, even if UF was not discriminating against the American public by monopolization or against Standard and other competitors, it still intended simply to break IRCA in reprisal for Ripley.

On the facts, we have seen that predominant legitimate motives prompted the liquidation of Tiquisate. The motive of reprisal is, thus, contra-indicated. But since the plaintiff presses the point, though he has failed to prove it, perhaps another word should be said on the question of a singleminded intent to destroy IRCA.

I wonder what motive a businessman would have to destroy another business which was not a competitor when he had not even the intention to go back to that market after the victim's body was buried. Revenge, in the pure form suggested by counsel for the plaintiff, is not in the vocabulary of business. While Adam Smith and Ricardo may have oversimplified things, it is still a truism that business corporations are economic animals with a lust for profit. It is a large assumption, indeed, that they would be subject to the petty revenges of princelings. To drive even a competitor out of business would mean that the driver hoped at least to move toward a monopoly market after the debacle. To destroy a railroad just to hurt it is hardly a game played by sane men. It would be something like the act of kicking an inanimate object after one has stumbled over it. (See Holmes, The Common Law, pp. 11-12).

In substance, then, I find that the plaintiff has failed to prove its antitrust claims under the Third Claim, the findings leading to the conclusion having been detailed in the Findings of Fact filed herewith.

Sixth Claim: Clayton Act § 7

The plaintiff contends that the acquisition of stock by UF in IRCA in 1928 and 1936 was in violation of Section 7 of the Clayton Act and that its effect was to restrain commerce to the injury of IRCA. 11/

There is no doubt that a vertical acquisition, as well as a horizontal acquisition, may violate Section 7. United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586 (1957). It is also settled that money damages as well as injunctive relief may be predicated on a Section 7 violation. Gottesman v. General Motors Corp., 414 F.2d 956, 960-61 (2 Cir. 1969) The difficulty here is that Section 7 speaks principally to the future. It was intended largely to nip in the bud incipient dangers of lessening competition, restraint of commerce or a tendency to monopoly.

This action was brought thirty-seven years after the original stock acquisition. And while impact within the period of limitations is enough to invoke jurisdiction, the threat of competition is measured at the time of suit. United States v. E.I. DuPont de Nemours & Co., supra, 353 U.S. at 607. This action was begun in 1965. UF had already sold its stock in 1962. At the time of the suit there was no possibility of a tendency to limit competition or to monopolize by reason of the stock acquisition.

General Conclusions

In the opinion denying summary judgment for the defendants I noted that "we must assume on this motion that until all the facts are in, we cannot determine whether policy based on precedent will support the standing of the plaintiff to sue." 358 F. Supp. at 1373.

The facts are now all in. In determining the motion for summary judgment, the Court concentrated on whether acts committed after the statutory period as determined by the Court of Appeals, 373 F.2d 408, could

give the plaintiff standing to sue for the alleged antitrust violations. In view of the limitations period set by the appellate court, neither side pressed strongly the question of whether there were acts committed before the statutory period which caused injury within the statutory period. It was not important to consider this question separately since summary judgment was denied in any event. The decision turned on whether standing could be denied on summary judgment. The issue of proximate cause was considered only in relation to standing. The plaintiff did not rely on Zenith Radio Corp. v. Hazeltine Research, Inc., supra, in support of a claim of antitrust violations in an early pre-statutory period that would support injury in the statutory period.

It does so now. Plaintiff now contends that antitrust violations occurred before February 1961, but which were not sufficiently clear as future damages to permit proof of such damages except within the statutory period.

The theory apparently is that no matter how far back the act of injury goes, it is redressible if its effect

lasted into the statutory period. While, at first blush, this would seem to negate the intention of Congress in creating a four year statute of limitations for antitrust violations, the Supreme Court did carve an exception in Zenith, supra, for a situation where the future damages were not calculable when the violation occurred, excluding such damages from the bar of the statute of limitations. It is not clear how far the Court will go in situations going beyond the facts in Zenith, where the conspiracy actually continued into the statutory period.

Assuming, arguendo, that the changes wrought by the Government consent decree of 1958 and the Ripley judgments would not, even if they caused a prior conspiracy to stop, prevent the Zenith rule from applying, we must turn to whether there were antitrust violations prior to the statutory period, whether such violations, if found to exist, proximately caused the later injury in the legal sense, and whether they gave the plaintiff standing to sue (a point reserved in my earlier decision).

The Court of Appeals in sustaining the partial defense of the statute of limitations in this case said:

> "But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill. Moreover, the statute of limitations itself embodies a strong policy 'to promote justice by preventing suprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF." 373 F.2d at 416. (footnotes omitted).

Judge Friendly was, of course, not thinking of the Zenith exception for that had yet not come down. But in analyzing the Zenith exception considerations of policy may distinguish between the continuous conspiracy, as in

Zenith, and the alleged conspiracy which had become a matter of history by the time the statutory period began.

The plaintiff contends that the contracts between IRCA and UF were of a continuing nature, that earlier contract pressures were antitrust violations, and that certain future effects were not provable until they happened.

The essence of the claimed antitrust violations is that IRCA was harmed because it was forced to operate under conditions that discouraged competitors of UF, who would have been shippers on the railroad, from growing bananas in Guatemala.

I must find that the plaintiff has failed to carry its burden of proof. One large competitor of UF, Standard, did come into Guatemala, and left, so far as the unrefuted evidence shows, only because a "blow-down" destroyed its plantations in 1961.

The plaintiff has not shown that there ever was a single other potential competitor who indicated an interest in Guatemalan banana growing to the point

of approaching IRCA to see what arrangements for shipping could be made. Nor has the plaintiff adduced any evidence that there were potential competitors who had the rather large financial means required to enter into competition with UF in growing bananas in Guatemala. See Stearns v. Tinker & Rasor, 252 F.2d 589, 606 (9 Cir. 1957).[27]

An antitrust claim requires more than a theory. It is noteworthy that not only was no evidence adduced to prove the foregoing, but no official of Standard was deposed or brought to testify for the plaintiff at the trial, nor were any potential competitors deposed to prove their ability to go into Guatemala and their unwillingness to do so because of alleged restraints of trade by UF.

As a result, the claim of injury because of conspiracy or monopolization has not been shown to be the cause, proximate or substantial, of actual injury to IRCA. To the extent that UF paid less freight charges than it should have, that was a matter of breach of fiduciary duty and has been recompensed by the Ripley judgments. The absence of proof of direct harm to competitors of UF makes a fortiori the absence of proof of indirect harm to IRCA itself.

It is necessary for a plaintiff to prove that the acts claimed to be in violation of the antitrust laws caused damage, in this instance, actually kept potential shippers out of Guatemala. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); Salerno v. American League, 429 F.2d 1003, 1004 (2 Cir. 1970), cert. denied, 400 U.S. 1001 (1971); Bendix Corp. v. Balax, Inc., 471 F.2d 149, 163 (7 Cir. 1972). And such proof must show a clear causal connection by a preponderance of the evidence. Ansul Company v. Uniroyal, Inc., 306 F. Supp. 541, 567 (S.D.N.Y. 1969) (Mansfield, J.), aff'd in pertinent part, 448 F.2d 872 (2 Cir. 1971), cert. denied, 404 U.S. 1018 (1972).

No matter how sympathetic a court may be to a plaintiff as a "private attorney general," "it is uniformly held that liberality may be used in estimating the amount of damages after it has been shown that they were caused by acts contrary to the anti-trust statutes, but that this liberality does not extend to proof that the damages were caused by the illegal acts." M.O. Dantzler v. Dictograph Products, Inc., 309 F.2d 326, 330 (4 Cir. 1962), cert. denied, 372 U.S. 970 (1963).

[RETYPE of page 45 of Opinion after trial on issue of liability alone (Gurfein, J.)]

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Here, the "causative link" has not been proved. See Billy Baxter Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2 Cir. 1970), cert. denied, 401 U.S. 923 (1971); Kinzler v. N.Y. Stock Exchange, 62 F.R.D. 196, 200-01 (S.D.N.Y. 1974). Accordingly, the Zenith rule simply does not come into play.

The failure of proof of any injury from antitrust violation makes academic a discussion of standing. But since so much effort was devoted to the question by the parties and by the court on the summary judgment motion perhaps some statement is in order.

In the summary judgment opinion I limited the discussion of standing to the limitations period -- following February 16, 1961. I treated the gravamen of the claim that survived the limitations defense as the allegation that in the abandonment of Tiquisate, IRCA had become a prime target as a reprisal for the enforcement of the Ripley judgment. Since the Zenith question had not been raised I did not discuss standing before the limitations period, and reserved the entire issue of standing for decision after trial. 358 F. Supp. 1363, 1373.

In view of the outcome of the trial there is no need to decide specifically whether IRCA had standing to sue. Considering the complexity of the problem applied to these particular facts, it is better to leave further discussion of standing for another time.

While in the light of this decision it is not strictly necessary, I find as an alternative ground that the plaintiff has failed to prove that the loss of its property to the Guatemalan Government and its effective ouster from that country were substantially caused by the acts of UF.

The record shows abundantly that over the years the Guatemalan Government and the labor unions together caused IRCA to come upon evil days unrelated to the activities of UF.

Unfortunately for the IRCA stockholders the record is quite clear that its financial troubles come from other sources than UF.

IRCA prospered through 1957. It was the only means of transportation from the Atlantic Ocean at Puerto Barrios to Guatemala City. The communists took over in the regime of President Arbenz from 1951 to 1954, and IRCA

became the target of nationalist attacks. During that period, highway construction began which ultimately parallelled the railroad routes and subjected the railroad to disastrous truck competition.

In 1955, the government opened its own modern port at Mateas de Galvez to compete with Puerto Barrios. The new government port became the eastern terminus for the government's new highway. IRCA was denied permission to build a spur line to the new port, which also discriminated in port charges to its own benefit. Certain goods, by Government decree, were required to be shipped through the government port.

In 1958, the railroad had serious union difficulties. Over the years, those serious labor difficulties continued. On January 3, 1968, the union started a strike because of IRCA's failure to pay a Christmas bonus in a loss year. The Government made a loan to the railroad far below its minimum capital requirements, and when the railroad was unable to meet the rigorous loan conditions, the Government foreclosed and took over the railroad in January, 1969. (PX 245).

It cannot be gainsaid that the people who bought the IRCA stock and now control it were quite familiar with the dangers involved. Judge Friendly noted in 1967 that "68% of the common stock of IRCA is owned by a recent purchaser," 373 F.2d at 416, n.13. These purchasers must have known that elements presaging a debacle were present and that these elements were neither caused nor controlled by UF from whose ownership their IRCA stock derived. 12/

The Contract Claim

In the summary judgment opinion I noted that the plaintiff contends that the contract required CAG to ship substantial quantities of bananas for the life of the contract. I ruled that the contract expired January 1, 1963. I noted that the issue of whether CAG had an obligation to ship any particular volume was determined adversely to the plaintiffs' contentions by the Referee in Ripley, 358 F. Supp. at 1376.

It was therefore held that there was a collateral estoppel on the issue, relying in part on the New York doctrine that collateral estoppel will be applied when

there has been a "free and fair opportunity" to litigate the issue. See Schwartz v. Public Administrator, 24 N.Y.2d 65 (1969).

At trial particular findings of the Referee in Ripley were admitted in evidence on the issue of collateral estoppel.

Thus, the Referee found that "IRCA undertook to transport all bananas tendered by CAG for transportation to Barrios from Western Guatemala with no corresponding obligation on CAG to ship any given amount of bananas over IRCA at the rates specified in the contracts." (D 101-G); PX 14, 15.

The Referee found that "IRCA was obligated to transport promptly all bananas tendered by United on the Pacific side; no obligation was imposed on United to ship any such bananas." B 360(d).

In the summary judgment opinion I held that there was collateral estoppel on the point that CAG had no obligation to ship any quantity of bananas. I concluded that the issue was open for independent consideration only for the years not covered by the Ripley supplemental judgment, the period following December 31, 1960. 358 F. Supp. at 1377.

Upon careful review I have concluded that my ruling was erroneous. The acceptance of the Ripley findings as collateral estoppel should not have been limited to the period before 1961. Since the Ripley finding that there was no obligation to ship on CAG's part related to a contract that did not expire until January 1, 1963, the interpretation was binding to the end of the contract.

I did note in the earlier opinion:

> "It is apparent, therefore, that any claim of breach of contract involving failure to ship bananas in volume as distinguished from the antitrust claim that arose before December 1960 could have been litigated in the State Court. Any claim of loss because of an allegedly insufficient volume was available as an item of damage." 358 F. Supp. at 1377.

The Ripley finding that there was no obligation to ship disposed of any right to damages. If the contract was unconscionable as a breach of fiduciary duty, that was fully litigated in the State Court. If treated as a simple breach of contract, the Ripley finding precludes a subsequent finding, on the same contract, of an implied covenant to continue to ship. The issue may not be relitigated.

Even if it were relitigated I would be constrained to find as the Ripley court, did, that, since there was no obligation there was no breach up to 1961.

The complaint against CAG alleges that defendant breached its contract "by ceasing all shipments of bananas in or about August 1964." 358 F. Supp. at 1373. Since this Court has ruled that the contract terminated January 1, 1963, the actual cessation of shipments because of the closing of Tiquisate after the contract had ended has no legal significance.

So far as the claim that gradual abandonment of Tiquisate was a breach of contract is concerned, I find that no corporate decision to close Tiquisate was taken during the years 1961 and 1962. There is evidence, which I credit, that in 1961, Mr. Sunderland on the basis of a cash flow report decided to continue Tiquisate operations at least through 1962 (DX 222; Tr. 757). The recommendation to close Tiquisate did not come until after August 5, 1963 when a Carpenter memorandum stated why Tiquisate had become unprofitable and predicted a poor future. (DX 341; Tr. 800-02, 867-70).

There is credible evidence that maintenance of Tiquisate was kept up during the 1961-1963 period (DX 499, pp. 1-2, 14) and that the cultivations were maintained by cleaning, pruning and nitrogen fertilization, as well as aerial spraying. (DX 500, pp. 2-3).

I also find that the reduction in carloads shipped from Tiquisate from 13,693 in 1961 to 7,30- in 1962 was largely attributable to Panama disease and blowdowns, including the big November, 1961 hurricane (Tr. 1244-45; DX 227). Stems shipped in 1961 were about 3.3 million, and in 1962, about 2 million. The difference of 1.3 million stems is attributable to a variety of factors. The stems shipped per acre in 1962 were less than in 1961, la_ely because of blowdowns (DX 548). There were 208 stems per acre lost by blowdown in 1962, compared with 151 in 1961. There was also a reduction in average acreage in bearing from 16,557 acres in 1961 to 14,28- in 1962. This reduction was due largely to Panama disease and to a lesser extent to blowdowns.

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Accordingly while I refused to grant summary judgment on the question of whether a gradual abandonment might legally be equivalent to an unlawful cessation of business, I find, after trial, that the plaintiff has not proved that the reduction in shipments was substantially caused by other than agronomic factors.

For all the foregoing reasons, the complaint is dismissed. Judgment will be entered for the defendants. 14/

Dated:

JAN 29 1975

MURRAY I. GURFEIN

MURRAY I. GURFEIN, U.S. Circuit Judge
Sitting by Designation

FOOTNOTES

1. This opinion should be read in conjunction with the earlier opinion. The court also rendered a decision dated April 25, 1974, admitting in evidence certain findings of fact in the Ripley case and holding that they had a collateral estoppel effect as of December 31, 1955.

2. While the action against CAG was consolidated, it did not appear by separate counsel or offer any proof on its own behalf.

3. The Ripley court found that IRCA was under the practical control of United at least to 1955. This finding is accepted as collateral estoppel (issue preclusion). But its effect here does not go beyond 1955, more than five years before the statutory recovery period begins.

4. UF sold substantially all its IRCA stock to BSF Company which sold the great bulk of it to Trans Caribbean Airways, controlled by Roy O. Chalk. Trans Caribbean bought more stock so that it owned 340,000 of IRCA's 500,000 shares of Common. This block was later sold by Trans Caribbean to one Yaeger who became Chairman of the IRCA board and who retained present counsel to plaintiff.

5. Ripley v. Intl. Ry. of Cent. Am. & UF, 8 A.D. 2d 310, aff'd, 8 N.Y. 2d 430 (1960).

6. February 16, 1961 is an important date. On that day McGovern, the sole representative of UF on the IRCA Board died, and Sunderland of United advised the IRCA Directors that UF would not nominate anyone to the IRCA Board.

February 16, 1961 also became the date on which the statute of limitations ran on the antitrust claims, because this federal action was filed on February 16, 1965, exactly four years later.

7. The finding related to the claim of plaintiff that the Statute of Limitations had been tolled because the potential defendant controlled the IRCA Board.

As early as July, 1957 after Judge Hammer's decision in Ripley, UF sought to have IRCA call a special meeting of its stockholders to modify the contracts, but apparently IRCA was, by then, independent enough to refuse UF's request, and the meeting was not called.

8. The specific section of the contracts with IRCA which prohibited IRCA from encouraging competition with UF was eliminated under the Consent Decree. (DX 73-DX 75).

9. The parties have favored the court with over 1,000 pages of argumentative briefs plus proposed findings. They will be referred to as follows: P's memo of law--P.M.; D's post-trial brief--D. Br.; P's Answering Memo--PAM; D's response--D.R.; P's Memo Reply--PMR; D's Reply Brief--D.R.B.

10. Judge Friendly had noted: "Moreover, the second claim may have scant practical application to that relatively recent period [after February 16, 1961] in view of the provisions for rate increases in the Ripley judgment." 373 F.2d at 417.

11. Section 7 (15 U.S.C. § 18) provided in pertinent part, prior to 1950:

> "Sec. 7: That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

In 1950, it was amended to read as follows (15 U.S.C.A. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

12. Plaintiff's reliance on the entry of independent banana importers into Ecuador is not convincing. In Ecuador a banana company could buy bananas without the large investment involved in growing them.

13. There are a number of sharply contested legal issues which the court has assumed, but only arguendo, in favor of the plaintiff. These include plaintiff's claims that (1) the relevant market under the Sherman Act is the "service of transportation of bananas from the western side of Guatemala to Puerto Barrios on the Atlantic side for shipment to the United States" (P. Br. 21); (2) that UF and CAG come within the intercorporate conspiracy doctrine; (3) that IRCA, the acquired company was "engaged in commerce" under Section 7 of the Clayton Act. See Gulf Oil Corp. v. Copp Paving Co., Inc., _____ U.S. _____; 43 U.S.L.W. 4059 (Dec. 17, 1974).

In view of the factual and legal determinations after trial in favor of the defendants, it is unnecessary to decide the foregoing legal questions.

14. The detailed findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a) are filed in the office of the Clerk of the District Court for the Southern District of New York. To the extent that findings in this opinion are in addition to such findings they may be deemed to be incorporated in the formal findings. In the accompanying opinion United Fruit is designated as "UF" to conform

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with the earlier nomenclature used by the Second Circuit and by the District Court on the summary judgment motion. In the findings of fact United Fruit is referred to as "United" to follow the designation used by all parties in their respective proposed findings.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

#41825-A

Plaintiff,

-against-

65 Civ. 479

UNITED BRANDS COMPANY,

Defendant.

- X

INTERNATIONAL RAILWAYS
OF CENTRAL AMERICA,

Plaintiff,

-against-

72 Civ. 649

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

- X

JAN 14 2 55 PM '75
S.D. OF N.Y.

APPEARANCES

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GURFEIN, Circuit Judge (sitting by designation):

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1/]

1. Plaintiff International Railways of Central America ("IRCA") was engaged in the operation of a rail system in Guatemala until its assets in that country were taken over by the government of Guatemala at the beginning of 1969 on default of its loan from the Government. IRCA's main line ran from Puerto Barrios on the Atlantic coast of Guatemala across the isthums to the Pacific coast.

2. Since 1912 IRCA has been the only railroad enterprise in Guatemala of any significance holding itself out, and operating, as a common carrier by rail (there is a twenty mile line operated by the Government in the Coban area).

3. The bulk of Guatemalan import and export traffic is transported through Puerto Barrios.

To market CAG bananas required at all times that they be shipped over IRCA to Barrios.

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4. Defendant United Brands Company is the successor by merger of United Fruit Company ("United"), the original defendant in the United Brands action. United and its subsidiaries were engaged in the business of producing, purchasing, transporting and selling tropical products, especially bananas. The bananas were produced and purchased by United and its subsidiaries in Central America, South America and the Caribbean, and exported to the United States and other countries.

5. Defendant Compania Agricola de Guatemala ("CAG") is a wholly-owned subsidiary of United. CAG was engaged until August, 1964 in banana production on land it owned on the Pacific side of Guatemala in the area around the town of Tiquisate. The bananas produced by CAG were shipped, pursuant to contract, about 300 miles via IRCA's lines to Puerto Barrios, as there was no deep water port on the Pacific Coast. CAG did not sell any bananas in the United States; it sold its bananas to another United subsidiary which in turn marketed them.

6. United-CAG at all material times exported most or all of the bananas sent to the United States from Guatemala.

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CAG shipped carloads of bananas via IRCA from the Tiquisate area to Barrios, for export largely to the United States, as follows (¶57 of Amended and Supplemental Complaint - Admitted):

Year	No. of Carloads
1948	25,632
1949	14,593
1950	21,301
1951	12,440
1952	4,534
1953	16,079
1954	14,710
1955	12,988
1956	14,191
1957	14,435
1958	13,230
1959	13,799
1960	17,559
1961	13,693
1962	7,305
1963	9,177
1964 (through May 31)	6,270

7. IRCA was used as the means for transporting substantially all of the bananas from growing areas to seaboard for export from Guatemala to the United States. At all material times, IRCA has been the only practical means of moving bananas in volume from the growing areas of Guatemala to Puerto Barrios, the main Guatemalan port of

xport of bananas shipped to the United States (PX 9, 2nd ¶; Ripley findings D188, D378, D383, D203).[2/]

8. In 1949, minority stockholders in IRCA commenced a derivative action, Ripley, et al. v. International Railways of Central America and United Fruit Company, against United and IRCA. The Ripley plaintiffs were represented by the same attorneys, with associated counsel, who represent IRCA in the present litigation. Plaintiffs in Ripley contended that United, as a controlling stockholder of IRCA, had breached fiduciary duties owed to IRCA.

9. The ultimate issue in the Ripley case was whether the contracts between United or CAG and IRCA were fair to IRCA. The case was tried in New York Supreme Court before Hon. Ernest E. L. Hammer who originally began the trial of the action as a Justice of the Supreme Court and continued to hear it as Referee to Hear and Determine after he had reached mandatory retirement age.

10. On December 14, 1957, a judgment was entered awarding damages to IRCA representing increases in the contract rates payable by United and CAG for the carriage by IRCA of bananas and imported materials for the period prior to January 1, 1956. This sum, together with interest, exceeded four and a half million dollars. The judgment also increased these contract rates retroactive to December 31, 1955 and prospectively to the termination of the contracts. (PX 1518). A supplemental judgment was signed on March 1, 1961, which awarded IRCA an additional sum of almost four million dollars representing the increased rates for the period from January 1956 through December 1960 plus interest (DX 182).

11. On June 23, 1959, the Appellate Division affirmed the judgment with one exception, i.e., that the Referee was held to have improperly reserved to himself jurisdiction to enter further orders at the foot of the judgment. The Appellate Division held that jurisdiction should remain in the court itself (8 App. Div. 2d 310 (1st Dep't, 1959)).

12. The Appellate Division's order was affirmed by the New York Court of Appeals on December 1, 1960 (8 N.Y. 2d 430). United's motion for reargument was denied on February 23, 1961 (9 N.Y. 2d 758).

13. After the New York Court of Appeals denied its motion for rehearing in February 1961, United paid the amount of the judgment and supplemental judgment in March 1961.

14. The United Brands action was commenced in this Court on February 16, 1965.

15. A motion by United for partial summary judgment was granted by Judge Ryan (254 F. Supp. 233 (S.D.N.Y. 1966)). On Appeal, the Second Circuit affirmed Judge Ryan's decision that the four-year statute of limitations (15 U.S.C. § 15b) barred the antitrust claims arising before February 16, 1961, but reversed the decision that the antitrust claims were barred by the rule against splitting a cause of action (373 F.2d 408 (2 Cir.)), cert. denied, 387 U.S. 921 (1967), rehearing denied, 389 U.S. 1059 (1968)).

16. The CAG action was commenced on February 14, 1972, and it was consolidated on the same day with the

United Brands action. A previous action by IRCA against CAG, asserting the same claim, had been brought in the District of Massachusetts on October 9, 1968. That action was dismissed and the present CAG action commenced in order to have both the CAG and United Brands actions before the same Court.

17. Defendants' motion for summary judgment on the antitrust claims and on the contract claim in this consolidated action was denied in part and granted in part by this Court on May 8, 1973 (358 F. Supp. 1363 (S.D.N.Y. 1973)). With respect to the antitrust claims arising under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, this Court held that there were issues of fact with respect to whether plaintiff had standing to maintain the action and reserved that issue for trial. In addition, on plaintiff's claim under Section 7 of the Clayton Act, this Court also reserved for trial the question of whether plaintiff was "engaged in commerce" (358 F. Supp. at 1373). On the contract claim, this Court granted partial summary judgment holding that the contract with plaintiff expired on January 1, 1963, rather than in 1967 as plaintiff

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contended (Id. at 1373-74). In addition, applying principles of collateral estoppel, the Court limited the damage period for the breach of contract claim against United to the period between January 1, 1961 and December 31, 1962. Under the applicable statute of limitations, the claims against CAG for breach of contract were limited to the period between October 9, 1962 and December 31, 1962 (Id. at 1377-78). The Court reserved for trial on the contract claim the issue of whether there was a"substantial termination of West Coast [Tiquisate] business before December 1962" (Id. at 1378) and whether "in the absence of a specific covenant to maintain the business [such substantial termination] would be actionable" (Id.).

18. Trial commenced on January 23, 1974, and took place over 14 trial days ending on March 11, 1974, except for the offer of findings of fact made in the Ripley case. The Court heard seven witnesses whose testimony encompassed a trial transcript of 2045 pages. The Court received in evidence 435 plaintiff's exhibits and 358 defendants' exhibits.

19. On April 25, 1974, this Court rendered a decision admitting into evidence 111 Ripley Findings which

this Court held are binding in this action under the principle of collateral estoppel. The Court considered (1) whether the findings were necessary to the Ripley decision; (2) the questions of remoteness in time and whether they are relevant to the present action (Decision, April 25, 1974, pp. 6-7). As to the latter, the Court ruled that it would allow Ripley Findings as of December 31, 1955 (Id. at 12). The Court's reasoning for this holding was that while the antitrust violations are alleged to have begun as early as 1928, the Court can hardly assume that overt acts thirty-three years before resulted in damages after 1961 (Id. n. 8).

This Court held that the Ripley Findings it admitted into evidence speak only as of the date determined by the Referee to be the close of the record, December 31, 1955, and no later (Id. at 13). The ultimate issues of relevancy and causation were reserved (Id. at 12).

20. On May 14, 1974, the Court denied plaintiff's request for a further evidentiary hearing, ruling that the matters sought to be proved related to acts prior to December 31, 1955 or were cumulative of issues already extensively tried (Decision, May 14, 1974,pp. 3-4). The Court ruled that the trial was deemed closed (Id. at 4).

21. Although plaintiff originally asserted six claims against United, only four remain. The First, Third and Sixth claims are antitrust claims; the Fifth claim is a breach of contract claim. The Second and Fourth claims against United have been withdrawn. The only claim against CAG is for breach of contract.

22. The essence of the First claim is that United violated Sections 1 and 2 of the Sherman Act by requiring IRCA to discriminate in its rates and practices against other banana growers and that plaintiff was injured through the loss of profits it would have obtained from shipments by such other banana growers but for defendants' acts (358 F. Supp. at 1370).

23. The gravamen of the Third claim is that United violated Sections 1 and 2 of the Sherman Act by cutting its production at Tiquisate during 1961 and 1962, and deciding in 1963 to close the Tiquisate division the following year and by imposing alleged restrictions for banana growing on those purchasing the land during liquidation of the division. These actions are claimed to have been aimed at thwarting competition and also

directly harming IRCA in reprisal for the Ripley judgment. Plaintiff claims it was injured through the loss of profits resulting from loss of United's shipments and those of its competitors whose land use allegedly was restricted.

24. The Sixth claim involves an alleged violation of Section 7 of the Clayton Act resulting from United's utilization during 1961 of stock ownership in IRCA, originally acquired in 1928 and 1936, in order to substantially lessen competition in the importation of bananas into the United States. The same injury is claimed as is alleged in the First and Third claims.

25. The remaining aspect of the breach of contract claim is whether CAG substantially terminated its business prior to the end of the contract terms on December 31, 1962, and if so, whether any provision obligating CAG to do otherwise can be implied.

26. The banana is a tropical, highly perishable, non-seasonal fruit which, because of its peculiar qualities, must be planted, grown, harvested and transported according to a coordinated schedule. To accomplish that coordination, United's operations have necessarily included the use of

railroads, ports, steamships, communications, market distribution organization, and all of the necessary technical skills and professions. Bananas must be cut while green and unripe and transported in this condition by ventilated railroad cars and water carriers, refrigerated or ventilated, to ports of import within the United States and to distributing points therein. After the bananas are delivered to the wholesaler they are ususally kept in a refrigerated ripening and processing room where the natural ripening of the fruit is controlled until it is ready for sale and delivery to the retailer.

27. The principal banana producing countries in the American tropics at material times have been Ecuador, Honduras, Costa Rica, Guatemala, Panama and Colombia. Other producing countries include the Dominican Republic, Nicaragua, Mexico, Haiti, Martinique, Spanish Honduras and Guadeloupe (PX 1495).

28. United at all material times has been by far the largest importer of bananas into the United States.

29. During the statute of limitations period from February 16, 1961 to August 1964, when the Tiquisate

plantation was closed, IRCA did not discriminate in rates or practices between United and CAG on the one hand, and other banana shippers on the other hand.

30. There is no proof that IRCA charged different rates for the same services. Different services were rendered to Standard as compared with CAG and United.

31. From February 16, 1961 forward, there were no banana shippers of significance from the West Coast of Guatemala other than Standard Fruit and CAG (PX 1396).

In 1962 there were shipments of three banana cars by shippers other than CAG and Standard (PX 1396).

32. Standard closed its plantations on the West Coast of Guatemala in November 1961 (Tr. 72, 210-12).

33. Plaintiff has withdrawn its claim that there was discrimination in the rates paid on the line haul after February 16, 1961.

34. IRCA did not discriminate in dock charges.

35. IRCA charged wharfage to Standard for the work performed by IRCA labor in unloading bananas at the pier at Puerto Barrios (Tr. 72-73).

36. CAG and United used its own labor for unloading operations at the pier at Puerto Barrios and accordingly, paid no charge for such service; whereas Standard used the IRCA labor for which it paid (Tr. 74-75, 323).

37. IRCA agreed to the elimination of Standard's wharfage and switching charges if and when arrangements could be made with labor for Standard to take over the operation of unloading bananas at the pier at Puerto Barrios (DX 552, p. 3).

38. There is no proof that, considering CAG's contractual arrangements with IRCA on the whole, there was any discrimination in rates for banana transportation.

39. IRCA rates on Standard bananas for export from the western side of Guatemala, via Barrios, were as follows: from 1954 to December 31, 1961, $130 per car plus $3 per ton for wharfage, plus a charge for loading aboard ship, with the further addition after 1958 of a wage price and fuel oil differential (PX 1396; PX 523).

PX 1396; PX 523

40. IRCA performed services for Standard which it did not for CAG, to wit:

(a) IRCA spotted its banana cars in Standard's farms, whereas CAG operated its own 90 miles of rail lines with its own locomotives and crews to pick up bananas at its farms and carry them to the junction at Rio Bravo from which they were hauled by IRCA (Tr. 1338-40).

(b) IRCA provided labor for loading and unloading on the pier which CAG and United performed with their own labor. (See finding 36).

41. There is no competent proof of Standard's contractual arrangements with IRCA for transportation, loading and unloading of bananas. Nor is there convincing proof of the total charges to Standard for all transportation and dock services (Tr. 220-21, 414-15, 422-25, 428-29).

42. Plaintiff has withdrawn its claim that there was discrimination in import line haul rates paid after February 16, 1961.

43. IRCA did not discriminate in regard to dock charges on imports.

44. CAG's contract with IRCA, which was ordered to remain in effect by the Ripley Court, obligated CAG to "pay wharfage at the rate of $1.00 per ton in the case of import freight other than that which is for sale in the Company's stores which will be charged at $3.00 per ton" (PX 901; PX 1518, ¶¶ 7, 11(a)).

45. There is no proof of comparable wharfage rates paid by others. There were various wharfage tariffs covering different groups of commodities, many of which had been substantially reduced in order to meet competition from the government-owned port of Matias de Gálvez (Tr. 229, 242-43, 248-49, 312-19).

46. In general, United provided its own labor for loading and unloading on the pier (Tr. 75, 323).

47. IRCA did not discriminate in freight rates for transportation of diesel oil.

48. CAG's freight rates for diesel oil imported through Barrios and San Jose were contained in a contract with IRCA that was maintained in effect by the Ripley Court (PX 901; PX 1518, ¶¶ 7, 11(a)). There is no proof of the amount of the public tariff for diesel oil transportation (cf. Tr. 94-95, 315-18, 388-89).

49. There is no proof that anyone else imported diesel fuel in significant amounts, and there is no proof of the ports through which such fuel was imported or the comparative length of haul from such ports to inland destinations or the manner in which such fuel was imported and transported (e.g., through Matias de Galvez or some other port, by railroad or tank truck, directly from ship or from deposit tanks) (cf. Tr. 388-89).

50. CAG made arrangements for importation of diesel oil under unique circumstances whereby it did not pursue its right to construct a mooring installation off the beach at Concepcion and transport fuel oil over an expansion of its own rail line which it could have easily built between Concepcion and Rio Bravo. Instead, it made an arrangement that IRCA "was happy about" to build a diesel oil deposit tank in San Jose and which set rates for IRCA to take the oil from San Jose to Tiquisate thus enabling IRCA to obtain freight business it would otherwise have lost (Tr. 382-87).

51. Plaintiff has failed to meet its burden of proving loss, destruction or unavailability of the public

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tariffs so as to provide a basis for proof through the recollection of a witness (Tr. 317-18).

(a) Plaintiff had four years from the date of suit until the takeover of the railroad by the Guatemalan government to obtain the evidence of the public tariffs (Summons and Complaint dated February 16, 1965, PX 245).

(b) Even after the takeover, plaintiff has not proven that it even made an attempt in the five years before trial to obtain access to the IRCA files, which Cure reported could be done by Guatemalan Court order (PX 1521) or to obtain other public records of tariffs, that may exist in Guatemala.

52. Haase's testimony comparing rates and tariffs is rejected because of its lack of specificity as to amounts (Tr. 312-13, 318), his poor recollection which led the Court to strike portions of his testimony (Tr. 310-11), the inability of any witness to remember such statistical details (317-18, cf. Tr. 94-95).

53. IRCA did not discriminate in regard to practices on its pier.

54. United placed its loading conveyors on the north side of the Barrios pier at a time when there were no other banana shippers in Guatemala. After Standard entered the banana business in Guatemala, it installed its conveyors on an apron constructed on the south side of the pier. Accordingly, as a practical matter and in order to operate without interference with cargo loading on other parts of the IRCA pier, Standard loaded on its apron; and United used the side of the pier where its conveyors were located (Tr. 82-83, 157-58, 162, PX 881, ¶ 13).

55. There is a failure of proof to show that if another banana shipper wanted to install conveyors, there could not have been another apron constructed for its use. (cf. Tr. 157-58).

56. There is no proof that Standard or any other banana shipper was ever prevented from bringing in whatever size ships it desired to the Barrios port (cf. Tr. 115-16).

(a) There is no proof that any other banana producer had ships that were too large to be

accommodated on the south side of the pier, that any such producer desired to bring in a larger ship or that such producer was ever prevented from bringing in whatever size ship it wanted (cf. Tr. 115-16).

(b) There is no proof that any other shipper or IRCA was prevented from dredging any remaining portions of the port in order to increase its depth so as to accommodate larger ships.

57. IRCA did not discriminate in the allocation of banana cars (DX 467) (PX 147, 183).

58. The number of banana cars available was generally sufficient to meet all the needs of CAG, United and Standard. Accordingly, there was rarely occasion to practice any preference (DX 467, Tr. 344-51, 411-12).

59. There is no proof that in 1961 -- the only year during the limitations period in which both CAG and Standard were shipping from the West Coast -- there was any shortage of banana cars (cf. Tr. 348-51).

60. It was IRCA's policy to do everything possible to move the bananas of all shippers with the least possible delay. (Tr. 351).

61. IRCA was not contractually obligated to discriminate in favor of CAG and United against their competitors.

62. United complied with the provision of the consent judgment dated February 4, 1958, which enjoined it from "directly or indirectly" entering into, adhering to or maintaining any agreement, contract or arrangement with any common carrier by rail or water in the Western Hemisphere which provides that the common carrier will not accord to competitors of United terms, privileges and treatment in its transportation of bananas for sale in the United States or destined for sale in the United States proportionately equal to those accorded by the carrier to United. . . ." (DX 498, Art. VI, Section (A)(9); DX 73, DX 74, DX 76, DX 78).

63. On May 2, 1958, Mr. Wyatt of Sullivan & Cromwell, counsel for IRCA, advised United's counsel that after careful consideration, it was concluded that there was no agreement between United Fruit and IRCA which does not comply with the provision of the decree quoted above prohibiting discrimination (DX 76).

64. Chief counsel for the Ripley plaintiffs, with whom plaintiff's present attorneys were co-counsel, were advised on May 2, 1958 of Mr. Wyatt's conclusion as to the absence of any discrimination prohibited by the consent decree and he neither challenged that conclusion nor Mr. Wyatt's advising both IRCA and United thereof (DX 75).

65. The only contracts pertaining to banana shipments, in effect during the limitations period were the 1948 contracts as amended and ordered to continue in force by the Ripley judgment except for the rates. (PX 906-PX 913, PX 1518, ¶ 7).

66. At United's request, on April 15, 1958, IRCA formally cancelled paragraph 22 of the 1904 contract (DX 73, DX 78).

67. The provision in the main 1933 agreement requiring IRCA to transport "all bananas tendered by" United on the Pacific side of Guatemala (PX 889, ¶ 17) was, like the remainder of the main 1933 contract cancelled on May 18, 1948. Even if it had not been cancelled, the main 1933 contract would have expired by its own terms on February 3, 1958 (PX 889, ¶ 21). There is no such requirement in the 1948 contracts (PX 906 - PX 913).

68. The continuation of the 1948 contract (PX 909) after Ripley was a voluntary act of IRCA -- and it was in no way required or coerced by United.

(a) IRCA did not ask United to alter or amend the 1948 contract (Id.).

69. Plaintiff has not proven that IRCA actually owned the CAG cars. To the contrary, both parties treated the leasing arrangements as bona fide (PX 119; DX 552, pp.1-2) (also plaintiff's counsel conceded that CAG owned the cars, Tr. of Oral Argument, p. 99).

(a) In 1963, IRCA returned 100 unneeded cars to CAG pursuant to the contractual arrangement (PX 909, PX 119; Tr. 119; Tr. of Oral Argument, p. 98).

(b) In 1956 pursuant to the contractual arrangement, CAG offered IRCA the right to purchase 100 cars before removing them from Guatemala (DX 552, p. 2; PX 909).

(c) The Ripley judgment provided that there was "no determination . . . made herein as to ownership, now or in the future, of the locomotives and banana cars furnished to International Railways of Central America under the contract with Compania Agricola de Guatemala" (PX 1518, ¶ 8(f)).

70. The rates and practices complained of which were imposed by the Ripley judgment were not required by United (PX 1518).

71. The Ripley judgment ordered that United and CAG "shall continue to provide, at their own cost, for the operation of the removal of bananas from the cars and their placement aboard ship" unless IRCA entered into a different agreement with them (PX 1518, ¶ 8(d)).

72. The Ripley judgment dismissed the complaint with respect to diesel oil import shipments and wharfage on import shipments (PX 1518, ¶ 11(a)).

73. The Ripley Court found that equity and fair dealing did not require United to pay a wharfage charge on exports of bananas (Referee's Report and Decision, Sup. Ct., N.Y. Cty., June 27, 1957, p. 227).

74. The Ripley judgment, at IRCA's request, ordered that except for the rate changes, all agreements "shall continue to be up to the dates provided therein for termination, valid and binding on and between the parties thereto" (PX 1518, ¶ 7).

75. United did not exercise control over IRCA during the limitations period so as to require IRCA to discriminate against competitors.

76. United sold all but 100 shares of its IRCA stock in January 1962 and prior thereto had made diligent efforts to sell (Tr. 697-700, 702-07; DX 192; DX 235; DX 210; DX 215; PX 1161; PX 1163; DX 552, p. 31).

77. From February 16, 1961 forward, there were no United employees or officers on the Board of Directors of IRCA (DX 552, pp. 30-53; DX 563, DX 564, DX 565, DX 566, DX 567; Tr. 695-96).

(a) McGovern, an employee in United's law department and a director or IRCA, died on February 16, 1961 (DX 474, DX 552, p. 30; Tr. 697).

78. United did not participate in the selection of nominees or the election of IRCA directors during the limitations period (DX 552, pp. 30, 32-34, 36, 38-39; Tr. 697, 700-01; DX 475, DX 519, DX 520).

79. Oliver R. Grace, who replaced McGovern when he died, was proposed for the Board of Directors by Louis Yaeger, who was independent (DX 552, p. 30; 373 F.2d at 412 n.2, 414-16).

80. Sunderland of United advised the IRCA directors on February 16, 1961 that United would not nominate anyone to the IRCA Board or take part in the selection of nominees, and he requested IRCA not to nominate or continue any particular persons as directors because of a feeling that they might be agreeable to or desired by United (DX 475).

81. United did not vote its stock at the IRCA stockholders' meeting on May 31, 1961 (Tr. 697).

82. Sunderland made affirmative efforts to avoid interfering in the internal affairs and management of IRCA (Tr. 695-701, DX 475, DX 519, DX 520, PX 456, PX 462, DX 187, p. 2, ¶ 1).

83. A majority of the IRCA Board of Directors after February 16, 1961 was independent and free from control or influence by United.

84. The IRCA Directors after February 1961 until May 1962 consisted of the following:

(a) Louis Yaeger, whose principal occupation was personal investments and who owned a substantial block

as of April 18, 1961
(13,500 shares) of IRCA stock -- Yaeger was elected Chairman of the Board in 1961, a position in which he continued until shortly after the arrival of Mr. Chalk in 1963, and which he resumed after Mr. Chalk sold his interests to him in 1966 -- shortly after the beginning of this lawsuit (Tr. 504-06; DX 563, DX 552, p. 35, 42-43, 52-53).

(b) George A. Ruckle, resident manager of Spear, Leeds & Kellogg, stockbrokers, and the owner of 1300 shares of preferred stock as of April 18, 1961, was reelected in 1962 after United sold its stock (DX 563; DX 552, pp. 33-34, 38-39).

(c) James B. Cunningham, president of James B. Cunningham Company, rubber brokers, and the owner of 1500 shares of stock as of April 18, 1961. Cunningham was also reelected to the Board in 1962 after United sold its stock (DX 563; DX 552, pp. 33-34, 38-39).

Messrs. Yaeger, Cunningham and Ruckle were expressly found to be "three independent" directors elected in 1959 in the summary judgment decision as affirmed by the Second Circuit Court of Appeals (373 F.2d at 412 n.2, 414-16).

(d) Oliver R. Grace, partner in Sterling, Grace & Co., investment advisors and stockbrokers, who owned 900 shares of IRCA stock as of April 18, 1961. He was proposed by Mr. Yaeger to replace McGovern (DX 552, p. 30), and he continued as a member of the IRCA Board after United sold its stock in 1962

and throughout the Chalk regime until at least 1966 (DX 563; DX 567; DX 552, pp. 33-34, 51, 53).

(e) Edwin C. Price, president of Price Y Cia. and Industrial Waxes, Inc., general exporters, was first elected to the IRCA Board on May 31, 1961 when the Board was expanded from nine to eleven directors. He was reelected in 1962 after United sold its stock. As of April 18, 1961, Mr. Price personally owned 13,970 shares of IRCA and his companies owned another 11,330 shares. His wife owned an additional 3,800 shares. In July 1960, Mr. Price commenced a derivative action against United and IRCA alleging that United prevented IRCA from adopting a dieselization program (DX 563, DX 552, pp. 33-34, 38-39). The action was ultimately dismissed. However, the Second Circuit considered that Mr. Ruckle was independent because he gave information to Mr. Price in connection with his action (373 F.2d at 414, n. 7). Accordingly, Price was also independent.

(f) William Rosenblatt, whose business was personal investments and who owned 5,340 shares of IRCA as of April 18, 1961. He was elected to the Board for the first time in May 1961, and he continued as a director, after United sold its IRCA stock, through 1965 (DX 563, DX 567).

(g) Charles I. Stillman, director and Chairman of the Finance Committee of Time, Inc., the publishing firm, and a nominal shareholder. He was elected for the first time in May 1961 and was reelected in 1962 after United sold its IRCA stock (DX 563, DX 552, pp. 33-34, 38-39).

(h) Harold W. Haase -- Haase was neither controlled nor dominated by the United Fruit Company (Tr. 302, 304, 306).

(i) The remaining three directors were Walter B. McGregor, president of New Hampshire Finance Corporation and the owner of 1,000 shares of stock as of April 18, 1961; Herman E. Willer, Honorary Chairman of the Board of White Laboratories, Inc., the pharmaceutical firm; and Frank I. Tennyson, vice president, secretary and treasurer of IRCA (DX 563, DX 552, pp. 33-34). There is no evidence to establish that the former two directors, who were independent businessmen, were controlled during this period. Nor is there any proof that Mr. Tennyson, who continued to be reelected to the Board at least until 1965 (DX 567), was controlled by United.

85. In view of the absence of any contractual requirement to discriminate and the absence of proof of the exercise of control in this regard, IRCA was free to alter any of the complained of rates and practices but failed to do so.

86. After February 16, 1961, when the IRCA Board unquestionably consisted of independent directors and after January, 1962, when United no longer owned a controlling interest in IRCA, IRCA nevertheless did not change any of the complained of rates and practices. The IRCA Board after January 1962 was independent.

(a) For example, IRCA could have eliminated dock charges for Standard but in March 1961, its independent Board of Directors, without any exercise of influence by United, did not take action in response to Standard's request in this regard (DX 552, p. 31).

(b) IRCA could have reduced its rates for diesel oil if in fact the public tariff was lower than the CAG contract rate (which has not been established) but it did not do so.

(c) IRCA could have made different arrangements for operations on various portions of the pier, which it owned, if it so desired, but it did not do so.

(d) IRCA was entirely free to allocate all or any part of its own banana cars and locomotives to others, or to buy more equipment or to operate others' equipment if necessary.

87. Standard Fruit Co. entered Guatemala-west for bananas and shipped the bananas over IRCA to Puerto Barrios at the published tariff rates (PX 1396). Standard continued such shipments until November 1961 when its banana plantations were devastated by a hurricane (DX 227, p. 3).

88. Despite the complained of rates and practices Standard Fruit never cancelled a cutting and never missed a ship. (Tr. 345-48, 411-12).

89. IRCA did not lose any revenue as a result of the complained of rates and practices (Tr. 345, 412).

90. There is no evidence that the difference in depth between the sides of the piers customarily used by United and Standard, which was only three or four feet, had an adverse effect on Standard or IRCA (cf. Tr. 115).

(a) Standard's vessels were of a size which enabled them to dock at the side of the pier it customarily used (Tr. 81-82; 116).

(b) There is no evidence that the size of the ship Standard used was inadequate to carry all of the bananas it produced or intended to produce in Guatemala. Plaintiff has not proven that Standard's vessels from Guatemala, did not sail at less than capacity as it alleges in the case of United's vessels, so that Standard could have expanded shipments without increasing vessel size.

(c) There is no evidence that Standard ever had the intent, preparedness or capacity to bring larger ships into Barrios or that if it had intended to do so it could not have used the north side of the pier (cf. Tr. 115-16).

91. Standard closed its operations in Western Guatemala in November, 1961 following a severe hurricane which severely damaged its plantations (DX 227; Tr. 72, 210-12).

92. There is no evidence that Standard would have expanded its plantations prior to 1961 or remained

in Guatemala thereafter if IRCA's rates or practices had been altered (cf. Tr. 415-17).

93. There is no evidence that Standard had the intent, preparedness, including finances, laborers, and the like, or the capability of expanding its plantations in Guatemala (cf. Tr. 416-17).

94. There is no evidence that Standard believed that it was being discriminated against.

95. There is no evidence that Standard asked IRCA to give it a greater share of the use of the CAG cars or that IRCA refused such a request or that Standard's inability to obtain such a greater share influenced it not to expand its Western Guatemala plantations (cf. Tr. 345-48; 411-12).

96. There is no evidence that if Standard needed more cars it could not have purchased, leased or made other arrangements to obtain them.

97. During the period that Standard was operating in Guatemala, plaintiff has not shown that it expanded significantly in other locations rather than in Guatemala.

98. Plaintiff has not proven that apart from IRCA's rates and practices Standard's other locations were less preferable than Western Guatemala.

99. There were no independent exporters of bananas in 1961 or thereafter (apart from three carloads shipped by an unidentified producer). Those few bananas may have been shipped to Europe (Tr. 359-62; PX 1396, p. 1 "Other Exporters").

100. Plaintiff has not proven the existence of any producers who had the intent, preparedness and capacity to ship bananas from Western Guatemala absent the complained of rates and practices.

101. Plaintiff has not proven that any other banana importers, including those shipping from Ecuador, had the financial capability to clear the jungles and provide drainage and irrigation facilities necessary to cultivate bananas in Western Guatemala (cf. Tr. 1950).

102. In order to create a plantation sufficient to produce two million stems a year, which is roughly equivalent to what CAG was shipping to the United States in 1961 an extremely large investment would have been required. (Tr. 1950-51). There is no proof that any other banana importer had the intent, preparedness or capacity to invest such a sum. It is unlikely that any other banana importer would have invested the sums necessary to produce bananas in Western Guatemala in view of the high risk caused by Panama disease and windstorms.

103. Plaintiff has not proven that banana importers had the intent, preparedness and capacity to have purchased in significant quantities from local Guatemalan farmers; and it has failed to prove that such farmers had the intent, preparedness or capacity to engage in the banana business in Western Guatemala but for the complained of rates and practices.

104. United was prevented from making substantial arrangements with local Guatemalan farmers because the Tiquisate union representing farm labor actively worked behind the scenes to stir up trouble and block the leasing

of farms to associate producers at a time when the country was already under martial law (Tr. 731; DX 477).

105. [DELETED]

106. [DELETED]

107. Banana growing was not a profitable venture for local farmers in Western Guatemala due to Panama disease, blowdowns and other problems (DX 130, pp. 27-28, 30-38; Tr. 733-34; see DX 548, DX 189).

108. The government in Guatemala unlike the government in Ecuador did not encourage banana production by way of government aid, in agricultural practices, transportation, and the like. The government of Guatemala never did anything to encourage banana production in a 100,000 acre plot adjacent to Tiquisate which CAG ceded to the Guatemalan government in 1954 (Tr. 720-23; 1317-18; DX 542).

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109. Plaintiff has failed to show that absent government aid, local farmers could operate as independent businessmen and achieve the preparedness and capability to successfully cultivate bananas in Guatemala which required sophisticated agricultural care, including spraying for sigatoka disease, irrigation, pruning, obtaining "clean seed" without nematodes, and the like (Tr. 719; DX 188, pp. 1-6; DX 499, pp. 3-6).

110. From December 31, 1955 through February 15, 1961, Standard was the only banana producer of any significance in Western Guatemala apart from CAG (PX 1396).

111. From 1955 to 1958 and in 1961, no bananas were shipped from Western Guatemala by anyone other than Standard or CAG. In 1959, only eleven cars were shipped by others and in 1960 only 30 cars were shipped by others (PX 1396).

112. Plaintiff has not proven that IRCA rendered the same services to Standard as to CAG in return for a different line haul banana rate.

113. Standard's plantations were located some 70 miles further west of the port at Barrios than CAG's plantations; thus involving a total additional round trip of 140 miles (Tr. 421; DX 305B).

114. IRCA performed spotting services for Standard. CAG did its own spotting.

115. The Ripley judgment required CAG to pay the public tariff for all shipments on and after January 1, 1958 (PX 1518 ¶ 8(c)).

116. For the period from December 31, 1955 to January 1, 1958, United was required to pay for banana shipments pursuant to a formula set by the Ripley judgment which provided for charges that were in excess of the contract sums and approached the public tariff on a graduated year by year basis (presumably taking into account the differences in services rendered to United and others, including length of haul, volume of shipments and incidental services such as spotting). United regularly accrued the payments due pursuant to Ripley while the appeals were pending and hence was not at any competitive advantage. The accrued sums were paid to IRCA with interest (PX 1518,

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¶ 8(b); Tr. 1602; DX 182, DX 183, DX 184; PX 1079, pp. 11, 12 n. 7).

117. Plaintiff has not offered competent evidence of the public tariff or the amounts paid by others for carriage of the same goods for the same length of haul of imports by United (cf. Tr. 308-11).

118. The public tariff for imported items varied for different types of cargo and such tariffs were substantially reduced after Ripley in order to meet government port and highway competition (Tr. 309; Tr. 242-43, 248-49).

119. The Ripley judgment required CAG to pay IRCA for transportation of imported shipments other than diesel oil at the rates provided in the 1946 contract plus an increase of 10% each year until the public tariff rate on each shipment then in force and effect was reached and thereafter thepublic tariff would apply. United regularly accrued such payments, and hence was not at a competitive advantage. The accrued sums were paid to IRCA with interest (PX 1518, ¶ 8(e); Tr. 1602; DX 182; DX 183; DX 184; PX 1079, pp. 11, 12 n. 7).

120. IRCA decided not to purchase 100 banana cars from CAG in 1956 principally on the grounds that it preferred to buy box cars, which had more capacity and were weatherproof (DX 552, p. 2).

(a) IRCA counsel was consulted on the 100 car question (DX 552, p. 2).

(b) McGovern and Pollan of United absented themselves from the IRCA Board meeting during the discussion of the100 car question and did not vote upon it thereafter (DX 552, pp. 1-2).

121. In 1959 when IRCA requested the return of the 100 cars CAG had legitimate business reasons for refusing including:

(a) the air brake equipment had been removed and plaintiff has not proven that it was available for installation (Tr. 355-56);

(b) it would have been expensive to re-install the air brake equipment even if it were available (Tr. 356);

(c) the reason CAG contemporaneously advanced for refusing was that it was less expensive for IRCA to dead-head

crews to the west coast plantations rather than to bring back the 100 cars and reinstall the air brake equipment. There is no evidence that CAG refused to bring back the cars in order to injure IRCA or competitors or that there was a shortage of cars at any time (Tr. 356-58).

122. Even prior to Ripley, the contracts between defendants and IRCA did not require IRCA to discriminate against competitors. The 1958 conclusion of Mr. Wyatt that the contracts did not require discrimination was equally applicable to the period prior to Ripley (DX 74, DX 75, DX 76). The Ripley judgment increased various United and CAG contract rates (PX 1518, ¶ 8, 8(a), 8(b), 8(c), 8(e)), but otherwise directed that the contracts continue (PX 1518, ¶ 7).

123. Even prior to Ripley, the contracts between defendants and IRCA did not provide for the rates which IRCA was to charge competitors (DX 74, 76).

124. The Board of Directors during the period May 27, 1959 - February 16, 1961 consisted of Yaeger, Ruckle, Haase, Cunningham, McGregor, Willer, Tennyson, Partridge and McGovern (DX 562; DX 563; DX 568; DX 552, pp 27-30).

Yaeger, Ruckle, and Cunningham were expressly found by the Second Circuit to be independent; Haase testified that he was not controlled or dominated by United; and McGregor, Willer and Tennyson were reelected to the IRCA Board in the May 1961 election at which United did not vote its stock or participate in the selection of nominees. Accordingly, at least seven out of the nine directors were clearly independent and not controlled by United.

125. Plaintiff has failed to prove that United exercised control over IRCA's directors during this period or thereafter.

126. Such control may not be assumed in light of the following facts:

(a) Beginning in late 1959 after he arrived and thereafter, Sunderland refrained from attempting to influence or control the internal affairs of IRCA (Tr. 693; DX 475).

(b) The IRCA corporate minutes in evidence do not reveal a single instance where there is a split vote regarding the adoption of any rate or practice, as between directors allegedly dominated by United and others, such as Yaeger or Haase who are unquestionably independent (DX 552).

(c) IRCA's Board of Directors refused to accede to United's request that it call a special meeting of shareholders to consider whether they desire the contracts in question under Ripley be ratified or cancelled (PX 141, 149).

(d) During this period McGovern did not participate in discussions or vote on matters pertaining to IRCA's relations with United or Standard. (DX 552, pp. 1, 3, 6, 8).

(e) On the appeal in Ripley, IRCA decided to oppose the position taken by United (see 373 F.2d at 415).

127. In the period December 31, 1955 - February 15, 1961 there were virtually no banana producers in Guatemala other than Standard, CAG and United (PX 1396; Tr. 36062).

128. Plaintiff has not proven the existence of other banana producers with the intent, preparedness and capacity to ship via IRCA during this period absent the complained of rates and practices.

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Tiquisate was closed in August 1964 pursuant to a company-wide decision to close various divisions and sell substantial quantities of land as a consequence of the development of a new type of banana, known as Valery, which required less land (Tr. 801-02).

130. In or about the early part of 1960, after Sunderland had been appointed president, United's banana business was showing poor and worsening financial results (Tr. 665, 707-09; DX 134, DX 135).

131. United's poor and worsening financial results in or about 1959 and 1960 were due in substantial part to the huge expenditures necessitated by Panama disease (Tr. 715, 738-39).

(a) Panama disease is an organism in the soil which attacks the roots of banana plants causing them to wither and eventually die. The disease blocks all the vessels in the roots that transport nutrients and water to the leaves and banana fruit. It is spread by means of a soil borne fungus that can be carried on carts and tools (Tr. 670, 1312).

(b) Areas infected with Panama disease had to be totally abandoned and could never again be used for cultivation of Gros Michel or Cocos bananas which were then being produced (Tr. 733, 1312).

(c) United was abandoning an average of about 15,000 acres per year of Gros Michel banana cultivations -- mostly due to the ravages of Panama disease which over the years totalled more than 925,000 acres (DX 329 p. 1).

(d) United's estimated planting costs to replace the acreage abandoned annually was between $22 million and $26 million a year (DX 329 p. 1).

(e) The large expenditure necessitated principally by Panama disease was for opening up new territory which included clearing jungle area, draining, grading, arranging for irrigation canals and creating living areas and municipal services for employees (Tr. 717).

132. At the same time that United was incurring high costs resulting from Panama disease, it was faced with increasing competition particularly by banana importers from Ecuador where the government absorbed much

of the expenditure that United had to make to develop its own plantations; and importers could purchase bananas in Ecuador without any significant investment or risk.

(a) The volume of banana shipments from Ecuador rose dramatically and by 1960 constituted over 40% of all bananas imported in the United States:

Banana Imports to United States

	Imports to U.S. From Ecuador (DX 507) (in millions of stems)	Total U.S. Imports (DX 30) (in millions of stems)	% from Ecuador
1955	16.6	47.0	35
1956	16.2	46.2	35
1957	16.7	47.7	35
1958	16.2	48.8	33
1959	22.9	54.2	42
1960	25.4	57.0	45

(b) United's competitors, who could buy bananas in Ecuador at a lower cost than the cost at which United could produce them, underpriced United and forced prices down (Tr. 723-25); average prices declined at all U.S. ports.

North American Banana Prices (All Ports)

Year	Price Per Cwt
1955	$7.43
1956	7.10
1957	7.23
1958	6.95
1959	6.72
1960	5.33

(DX 28)

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(c) The decline in prices was equally severe in those parts of the U.S. where Tiquisate bananas were sold:

Price Per CWT

	Southern U.S. Ports (DX 546B)	Eastern U.S. Ports (DX 546A)
1955	$7.22	$7.05
1956	6.74	6.79
1957	6.57	6.80
1958	6.46	6.55
1959	6.02	6.39
1960	4.73	4.90

133. In or about early 1960, Sunderland decided to institute a program to develop a Panama disease resistant banana known as the variety banana (Tr. 687; PX 1079 p. 6).

134. By the early part of 1961, United had determined from its research that the Valery banana was the most promising type of disease resistant variety (Tr. 737-39).

135. United decided to select the best divisions in which to produce the Valery banana and to close other divisions and sell surplus land for the following reasons:

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(a) The development of the Valery banana, which was disease resistant, eliminated the need to hold vast quantities of reserve land in which to expand when lands currently in cultivation were abandoned because of Panama disease (Tr. 738-39).

(b) The development of the Valery banana resulted in the need for less land and fewer divisions because the Valery could be grown on many thousands of acres of land already developed by the company, but which had been abandoned because of Panama disease.

(c) The Valery banana had a much higher yield than the Gros Michel (Tr. 739, 879-80).

136. United had a program to sell surplus lands in all divisions (Tr. 735-37). Thus, for example, of the 1.36 million acres owned by the Company at the end of 1961, approximately one-third, or 422,701 acres, were authorized for sale in twelve divisions (DX 530).

137. In 1963 the favorable and rapid development of the Valery program permitted United to reevaluate all

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of its banana divisions. Only the areas best suited for Valery were kept in operation because of consequent lesser land needs and the hope that Valery would improve the Company's poor financial performance (PX 1083 pp. 4-5, Tr. 792, 1995).

138. Sunderland decided in August 1963 to recommend not only the closing of Tiquisate but other divisions as well--two in the Dominican Republic, one in Nicaragua, and two in Columbia called Federation and Santa Marta. Sunderland wished to eliminate Ecuador as a regular source of bananas for the United States by the end of 1965 (DX 352 p. 3, 5; Tr. 869-70).

139. Part of the plan was to eliminate Ecuador as a regular source of supply for the United States and Canada by the end of 1965 (DX 352, p. 3). This necessarily meant that United would limit its production to certain areas in Central America and thus hope to compete against independents from Ecuador by high yield production of the Valery, fully boxed, and shipping from Central America with a competitive ocean freight advantage over Ecuador. As a part of this program United decided to phase out Tiquisate (Px 1277, p. 2).

United's arrivals from Ecuador to the United States declined from 7.4 million stems in 1960 to 0.3 million stems in 1965 (DX 557).

140. (a) While for practical purposes, operations in Santa Marta, Colombia ceased in 1963, the division was formally closed in 1966 (Tr. 806-07; DX 19, DX 344, DX 352).

(b) The Dominican Republic division was closed in 1966 (DX 19).

(c) Nicaragua was sold in the early 1960's (Tr. 1995).

(d) United had substantially ceased purchasing bananas in Ecuador in 1965 (DX 557).

141. United's selection of divisions to close and lands to sell was based in part on a policy of geographic dispersal (Tr. 787; DX 352 p. 2).

(a) One reason for this policy was the political dangers which were present in all Central American countries and which were particularly serious in Guatemala (Tr. 784-86, 734-35).

(b) Another reason for this policy was to provide increased protection against weather abnormalities in local areas, particularly wind storms to which Tiquisate was extremely vulnerable (PX 1082 p. 2).

142. Tiquisate was one of two United divisions located in Guatemala. The only other country in which United had two divisions was Panama, and one of those divisions, Armuelles, was selected as the candidate for divestiture under the consent decree (Tr. 787, 809-10, 822).

143. Sunderland and his staff of agronomic and financial experts concluded that Tiquisate was the worst of the company-owned divisions in which to grow the Valery banana (Tr. 741).

144. The conclusion that Tiquisate was the worst company-owned division in which to grow Valery was based upon reports, oral and written, that Sunderland received from his staff and relied on in deciding in August 1963 to recommend the closing of Tiquisate (Tr. 740-43, 801-02).

145. Sunderland was advised that at a meeting in July 1963, management personnel from Guatemala, Armuelles and company headquarters all agreed that Tiquisate should be phased out as quickly as possible (DX 341). Previously, in September, 1962, Sunderland had been advised that all division managers had recommended closing Tiquisate (PX 651 p. 1).

146. The information Sunderland had available in connection with the determination to close Tiquisate included oral reports which he received from his expert staff members in meetings regularly held for that purpose. (Tr. 740).

147. Sunderland also received written reports comparing Tiquisate with other divisions, including:

(a) The Miller Report (DX 189) contains the results of a study of all company-owned divisions on a comparable basis considering each important factor relating to the production of Valery bananas.

(b) Reports of the costs of producing Valery at Tiquisate and Honduras (DX 573A, DX 572).

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(c) An analysis by United's financial vice president -- referred to as the Carpenter Report (DX 341).

148. Sunderland also received reports from the Agricultural Department, which were relevant to the ability of Tiquisate to produce Valery bananas compared to other divisions, referring to various attributes of the Valery banana, including its thin skin which made it subject to bruising on the rail haul, its higher chill point which made it subject to chilling on the rail haul, and other characteristics of its ripening process and requirements during transportation (PX 2372 pp. 7-8, DX 330, DX 328 p. 12, DX 234 pp. 4-5, DX 189; Tr. 686).

149. The Miller Report (DX 189), authored by Miller, the head of United's Agricultural Department, was the result of a project participated in by United's tropical agricultural and financial experts, and by engineering, financial and agricultural experts from United's Boston headquarters. (Tr. 1981-83; PX 1534). A portion of the detailed back-up data to the report was marked in evidence by plaintiff (PX 1534; Tr. 1442). Mason (Brown University graduate in economics), United's Assistant to the

Vice President for Finance and later export Controller of the Company (Tr. 1487-88), and van Diepen (University of Toronto, B.S., Louisiana State University, MS. in agronomy), assistant to the head of the Agricultural Department and later United's Director of Research (Tr. 1223-25), both participated in the study (Tr. 1982-83, 1294).

150. The Miller Report, completed in March, 1961, was in progress at least as early as December, 1960 and must have been begun even earlier as shown by the back-up data (PX 1534).

151. Taking all important factors into consideration, the Miller study ranked Tiquisate as the worst division in which to grow Valery bananas (DX 189, p. 2).

152. The Miller Report sought to analyze all divisions on a comparable basis:

(a) It assumed that each division would consist of approximately 30,000 acres with the exception of Almirante which was projected at 25,478 acres (DX 189, pp. 1, 5).

(b) The value of existing assets not used

in the development was omitted in calculating depreciation costs (DX 189, p. 1).

(b) The value of existing assets not used in the development was omitted in calculating depreciation costs (DX 189, p. 1).

(c) Estimates were based on a normal year after the division had reached the desired acreage (Id.).

(d) It was assumed that all of the farms would be company-operated rather than run by associate producers (Id.).

153. The Miller Report concluded that Tiquisate would produce fewer stems per acre than any of the other divisions which were analyzed:

(a)

	Stems Per Acre (DX 189 p. 3)
Almirante (Boas)	315
Armuelles	300
Golfito	300
Honduras	300
Bananera	300
Tiquisate	280

(b) Tiquisate's landed cost compared to that of the other divisions was as follows:

Division	Landed Cost at U.S. Port Per One Hundred Pounds (DX 189 p. 4)
Armuelles	$4.154
Almirante (Bocas)	4.290
Bananera	4.328
Honduras	4.360-4.366 (Depending upon location of the cultivations).
Golfito	4.641
Tiquisate	4.909 (through East Coast port of Barrios)
	4.739 (through new port to be constructed on West Coast of Guatemala)

154. Tiquisate ranked fourth on the amount of new monies necessary to develop each division into a Valery plantation.

(a) The amounts necessary to develop each of the divisions into a Valery plantation were as follows (DX 189 p. 5):

Armuelles	$ 8,610,000
Almirante (Bocas)	16,295,000
Bananera	14,200,000
Honduras	9,012,100 - 11,228,300 (Depending upon location of the cultivations.)
Golfito	10,256,500
Tiquisate	12,510,000 or
	21,854,000 (includes construction of new port on West Coast of Guatemala)

(b) If a new port were developed on the West Coast of Guatemala, Tiquisate's new money requirements would have been far higher than any other division (Id.).

155. Tiquisate ranked last on the soil conditions factor. This included an analysis of both texture and depth of the soil (DX 189 pp. 1-2).

(a) In view of the increased production per acre from Valery, United decided to select only areas with first class soil to grow this type of banana (Tr. 1295; DX 234 p. 4, DX 330).

(b) The Tiquisate soil was volcanic in origin and thus, light, fluffy and porous (Tr. 748, 1243).

(c) The soil at other divisions was alluvial soil, laid down by rivers, and was heavier, deeper and had more body than the soil at Tiquisate (Tr. 1243-44, 748, 803; DX 234 p. 4).

(d) The light Tiquisate soil was the worst type for the production of Valery bananas (Tr. 1243-44, 747-48).

(e) The Valery root system was much shallower than that of the Gros Michel and since Valery roots

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did not reach deep into the ground, they would remain in the porous Tiquisate topsoil. Valery would thus be more susceptible to blowdowns and uprootings at Tiquisate (Tr. 748, 1243-44, 1327).

156. Tiquisate ranked fourth with regard to minimum temperatures and other growing conditions (DX 189 p. 2).

(a) Cold nights were a problem in Tiquisate because they retarded maturing of the fruit. (DX 122; Tr. 1355).

(b) Tiquisate lacked the evenness of rainfall of other divisions and hence required more extensive irrigation (Tr. 1280).

(c) The unevenness of rainfaull at Tiquisate combined with the porous nature of the soil which did not hold water well, made Tiquisate less desirable than other areas (Tr. 768, 1280).

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57. Tiquisate ranked last in the category of wind damage (Tr. 751, 1241-43, 1296-97; DX 189 p. 2).

(a) The 1962 Summary Annual Report of all of United's research activities, submitted to Sunderland in April 1963, concluded that Valery is not completely blowdown resistant, i.e., it can still be blown down if winds are of sufficient velocity (DX 328 p. 15).

(b) Although Valery was lower growing than Gros Michel, it could still suffer blow down losses from winds which were more prevalent at Tiquisate than in other divisions (Tr. 1326-27, Tr. 801-02, 789; DX 328 p. 15).

(c) The banana plants at Tiquisate were blown down and uprooted as a result of frequent windstorms. Tiquisate had up to sixteen windstorms per year with winds from 32 to 59 miles per hour (Tr. 1234, 1241, 1297, 1327; DX 124 p. 1).

(d) After a blowdown, production was lost for the twelve months that it would take to clean away the debris, replant and await the maturing of new fruit. The blown over plants would have to be chopped down and a "sucker" plant would be replanted (Tr. 1242).

(e) Many efforts were made at Tiquisate to combat the winds such as propping, guying, crop pruning and use of windbreaks, but all were unsuccessful (Tr. 1245; DX 81).

158. Tiquisate ranked second in terms of expansion potential (DX 189 p. 2), but this was not an important consideration because of Valery's immunity to Panama disease and greater yield, which meant that the Company would need less land in the future rather than more (Tr. 751-52).

159. Tiquisate ranked last in the category of relative location because of the long haul from Tiquisate to the port of Barrios (Tr. 1271-74).

(a) The distance from farm to port at United's other divisions was approximately as follows:

Tiquisate	-	300 miles
Bananera	-	25 miles
Armuelles	-	30-35 miles
Bocas	-	30 miles
Honduras	-	90 miles
Golfito	-	70 miles

(Tr. 1273-74, 1289).

(b) The rail haul from Tiquisate to Barrios, which took 30-35 hours (Tr. 1273-74) was very rough compared with any of United's other divisions; the rail bed was very poor, and the jerky ride caused by the stopping and starting of the trains caused bruising to the fruit. Part of the rail haul was through the Zacapa Desert where dust got into the cars and abraded the fruit (Tr. 1272-73).

(c) The rough railroad haul from Tiquisate to Barrios was worse for Valery than it had been for Gros Michel because the Valery was thin-skinned and more susceptible to bruising and abrasions than Gros Michel (Tr. 1324-26).

(d) On the trip from Tiquisate to Barrios, there were extreme temperature changes which would have resulted in chilling or premature ripening of the fruit (Tr. 750).

(e) Banana trains would leave the tropical heat in Tiquisate and pass through the Guatemala City highlands, stopping there to change crews and for maintenance, usually at night (Tr. 1273).

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(f) Valery chilled at 56° whereas Gros Michel chilled at 53° which meant that chilling would be a greater problem for Valery than it had been for Gros Michel (DX 234 p. 4; Tr. 1285).

(g) After passing over the mountains, the bananas would come down to the area near Barrios where very warm conditions would ripen the fruit (Tr. 750, 1274-75).

(h) Since Valery ripened faster than Gros Michel, and since unlike Gros Michel the Valery ripening process could not be stopped once it began, the problem of prematurely overripened fruit due to overheating would be more serious for Valery, making the long rail trip highly disadvantageous (Tr. 1325-26, 690, 963-64).

(i) United's Research Department concluded in April 1963 that boxed fruit must be shipped under specified temperatures for the first 24 hours and for the remainder of the trip (DX 328 p. 12). The IRCA trip took more than 24 hours (Tr. 671; DX 341), and temperatures on

the trip were both above and below thse recommended amounts (Tr.671, 1273-75).

(j) There were other serious obstacles to boxing at Tiquisate. Boxes were not available locally in Guatemala and the Guatemalan government refused to allow CAG to import the materials needed to make them (Tr. 756).

160. While the two Guatemala divisions, Tiquisate and Bananera, ranked next to last in terms of political climate, developments later in 1961 and in 1962 convinced Mr. Sunderland that Guatemala had the worst political climate of all the divisions (Tr. 754, 784-86).

161. A series of violent political disruptions in Guatemala following the preparation of the Miller Report caused Sunderland to conclude that Guatemala's political situation was much worse than Honduras, which had ranked last in this category in the Miller Report (DX 189 p. 2), and that Tiquisate then had the poorest political climate of all the United divisions in which to do business. (Tr. 784-86).

162. Events such as people being gunned down on the street, kidnapping, violent demonstrations, and the government imposition of martial law made it very difficult to operate at Tiquisate (Tr. 784-86, 754).

For example:

(a) In January, 1962, the government imposed a state of siege and suspended all Constitutional rights after the Chief of the Secret Police was murdered (DX 236).

(b) In December 1962, a group of 50 civilians captured a military detail, took over United's office, robbed its safe and held one of its employees as a prisoner (DX 238).

(c) In March 1963, martial law as declared (DX 323).

(d) The violent political situation also adversely affected labor conditions, and there were numerous strikes by employees of essential services such as railroad, water, electricity, telegraph and post office (DX 247, DX 248, DX 249, DX 251, DX 302, DX 303).

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(e) CAG's labor relations man in Tiquisate was shot and killed (DX 205; Tr. 784-85).

163. While United eventually decided to retain its Bananera division, the adverse political situation created a greater danger for Tiquisate which was more removed from the outside worlds and more dependent on the railroad than Bananera (Tr. 787-88).

164. In October 1962 a vice president of United states that, in his view, after checking into alternative methods of transporting bananas to ports "rail transport was the indicated method economically and otherwise" and "they needed the bananas for sale on the East Coast"; he also said that United's Board had authorized putting in boxing facilities at Tiquisate (PX 652A, pp. 2-3).

165. The only realistic means of transporting fruit from western Guatemala, either on a stem basis or boxed, through the port of Barrios, is by IRCA; it was out of the question to consider trucking fruit from Tiquisate to Barrios (PX 9, 2nd ¶).

(a) Bananera was close to the port where United's ships arrived and was thus able to maintain

regular communications and transportation to and from the outside world (Tr. 788).

(b) While the railroad was used to ship Bananera fruit to port, it was a short run that could be made by trucks in the event of emergency (Tr. 788).

166. Studies prepared in May and June, 1963 showed that Tiquisate would be a higher cost Valery division than Honduras (DX 572, DX 573A, DX 573B).

167. In or about August 1963, Mr. Sunderland caused a memorandum to be prepared by Mr. Carpenter, the Vice President of Finance, bringing together relevant facts relating to the decision whether to close Tiquisate. That memorandum (DX 341) reflected the following:

(a) Tiquisate had sustained cash losses in 1960, 1961 and 1962 of $1,382,000, $398,000 and $598,000, respectively.

(b) A cash loss before taxes was predicted for 1963 in the amount of $840,000.

(c) Tiquisate had turned from being a profitable division in the 1930's and 1940's to being unprofitable in recent years. CAG's profit (or loss) before taxes from banana operations at Tiquisate in the period of 1951-1953 was as follows (DX 46):

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1951 - $1.8	1958 - (1.0)
1952 - (7.4)	1959 - (2.5)
1953 - 2.9	1960 - (2.5)
1954 - 3.1	1961 - (1.4)
1955 - 2.8	1962 - (1.5)
1956 - 1.8	1963 - (.3)
1957 - .£	

168. Carpenter reported to Sunderland that the reasons why Tiquisate turned from a profitable to an unprofitable division were:

(a) Winds which were always a problem at Tiquisate became more or less constant as the Company cut down surrounding woodlands for expansion due to Panama disease abandonments, thus exposing the banana plants to constant winds which whipped the leaves and resulted in inferior quality fruit (DX 341 (8/5/63 memo p. 1)).

(b) While Valery bananas could resist 30 mph winds that would flatten a Gros Michel cultivation, Tiquisate had winds of 35 mph to 40 mph which would cause extensive loss to both Valery and Cocos bananas (DX 341 (8/5/63 memo p. 3)).

(c) The reduction in volume at Tiquisate

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after 1948 was caused by heavy floods in 1949 which damaged cultivation and increased the spread of Panama disease (DX 341 (8/5/63 memo p. 1)).

(d) There was a further drop in production in 1952 due to sever windstorms, followed by a six month suspension of work by the union in the fall of 1951 which resulted in lasting damage to the Tiquisate cultivations (Id.).

(e) As a result of labor conditions, railroad service over IRCA deteriorated to the point where it took in excess of 48 hours from the time fruit was cut until it was stowed aboard ship at Barrios, as compared to earlier years when this was done in 24 hours (Id.).

(f) Even if the high cost of the IRCA rail haul and the injury to the fruit resulting from that long haul could be avoided by shipping through a West Coast port, the quality of Tiquisate fruit would still be poor because of the wind problem (Id.).

169. Carpenter also provided Sunderland with a comparison of the Tiquisate division and the

Armuelles division in terms of profits, prices, costs, production and other relevant factors, on all of which Tiquisate came out worst (DX 341 (8/5/63 memo p. 2)).

(a) Tiquisate consistently shipped fewer pounds per acre during the 1950's and early 1960's than Armuelles (Id.).

(b) Tiquisate bananas consistently received a lower price than Armuelles bananas in the same ports; the poor quality of Tiquisate bananas resulted from wind damage and damage during the rail haul (Id.).

(c) Armuelles always earned a profit while there were large losses in Tiquisate operations (Id.).

170. Carpenter reported to Sunderland that Tiquisate labor costs were in excess of those in other divisions because of the poor quality of the labor (DX 341 (8/5/63 memo p. 1)).

171. Carpenter also advised Sunderland that when competitive conditions resulted in a deterioration of prices in the late 1950's, the profit margin at Tiquisate, which had always been a high cost division, disappeared (Id.).

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172. Sunderland received a five-year study (DX 352) prepared in August 1963 (DX 344; Tr. 867-69) which demonstrated that Tiquisate was United's highest cost division and showed the worst profit performance.

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Division	Banana Costs Delivered at U.S. Ports Boxed Fruit per CWT (DX 352 p. 8)	Banana Book Profits After Taxes In Thousands (DX 352 p. 9)	Banana Cash Profits After Taxes In Thousands (DX 352 p. 10)
Ecuador	$7.11	$(919)	$ (17)
Golfito	7.99	981	4,040
Dominican Republic	7.99	(517)	422
Guatemala East (Bananera)	7.48	20	1,342
Guatemala West (Tiquisate)	8.50	(925)	(284)
Honduras	7.58	(566)	653
Nicaragua	7.54	(215)	(160)
Armuelles	7.05	3,272	5,607
Bocas	7.48	(85)	1,442

173. Over a four-year period reflected on DX 548 Tiquisate had the worst blowdown damage of any Company-owned division.

174. Tiquisate bananas were imported into the Eastern and Southern ports of the United States (Tr. 1498). The annual average price per hundred pounds of stem bananas from Tiquisate compared with the annual average price for all of United's divisions combined, for the years 1955-1963, at all Eastern and Southern ports combined, is as follows:

Average Banana Prices Per Hundred Pounds of Stem Bananas
All Eastern and Southern U.S. Ports

	1955	1956	1957	1958	1959	1960	1961	1962	1963
Tiq.	$6.97	6.43	6.72	6.15	5.92	4,49	4.44	4.92	4.64
Avg.	7.13	6.76	6.69	6.51	6.22	4.82	5.19	5.68	5.56

(DX 546).

175. In 1963, the year in which the decision to close Tiquisate was made, Tiquisate's average price at all Eastern and Southern ports combined was $4.64 as compared with the company-wide average of $5.56 (DX 546).

176. During the transitional period of the conversion to the Valery banana (1960-1963), United did not conduct is operations to suppress competition or for the purpose of hurting IRCA.

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Tiquisate

177. Before and after February 16, 1961 United officials informed IRCA that unless the Ripley judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated.

178. IRCA refused to reduce the $130 Ripley-decreed rate.

179. United ordered CAG in December 1959 to prepare a 5-year plan on the following assumptions, inter alia (PX 502):

"1. There will be no planting of Gros Michel bananas.

"2. In 1960, and in each year thereafter, you will, by supplying, against your maintenance budget replace 500 acres of Gros Michel bananas with Cocos."

180. On June 15, 1960 Sunderland wrote to United's house counsel (before the Court of Appeals decision in Ripley) and inquired what United could do in the courts of Guatemala in the event the decision was against United (PX 5).

181. After the sale of its IRCA stock, United considered shipping the Tiquisate bananas by some means alternative to shipments via IRCA to Barrios, to be explored.

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182. United investigated the following shipping alternatives from Tiquisate, all of which United concluded, were uneconomic and unacceptable to it:

(1) Building an all weather port at Concepcion and shipping the bananas to the West Coast of the United States, and, through the Panama Canal, to the East Coast of the United States (PX 446, PX 620).

(2) Shipping the bananas by rail or truck over 100 miles to Acajutla in El Salvador and then shipping to the West or East Coasts of the United States (PX 711, PX 20) (cost through Acajutla was 50% higher than through Barrios (PX 711, p. 2).

(3) Selling the bananas at Tiquisate to IBAC for trucking to the Mexican border, for shipment through Mexico by rail, and then into the United States (PX 919).

183. There was no cutback in production at Tiquisate as such although volume varied as a result of the continued scourge of Panama Disease, blowdowns and other climatic conditions.

184. There was no decision in 1961 or 1962 to close or substantially terminate operations at Tiquisate.

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(a) Each time operations at Tiquisate were reviewed during that period, the decision was made to continue operations.

(b) In 1961, on the basis of a projection by Mr. Carpenter that the division would have only a minimal cash loss in the following year, Mr. Sunderland decided to continue operations at least through 1962 (DX 222; Tr. 757).

(c) On September 14, 1962, Mr. Sunderland was advised by Mr. Carpenter that while Tiquisate would have a negative cash flow before taxes in 1962, the projection for the ensuing two years 1963 and 1964 showed cash profits (PX 853). Accordingly, operations were continued past the December 31, 1962 termination date of the IRCA contract and into 1963.

(d) The decision to close in 1964 was made in August 1963 after Mr. Carpenter reported that there would be a cash loss of $840,000 in 1963 and that the outlook for the future was very bleak and the possibility of a break-even extremely dim. (DX 341).

185. During the transitional period, United decided on a company-wide basis to substantially reduce

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capital expenditures and to refrain from making substantial new plantings of Gros Michel bananas in virgin areas in several divisions--Honduras, Bananera and Tiquisate--to replace acreage continually being abandoned due to Panama disease, because this method of doing business had plunged United into near financial disaster and Valery was on the horizon (Tr. 681-82, 729, 793).

186. During the transitional period, United used Ecuador as a stop-gap source of supply in order to remain in business pending the gradual transition which was necessary from the Gros Michel to the Valery (Tr. 720).

187. During the transitional period, United continued to do such planting as was necessary to keep its divisions going (Tr. 718).

188. The planting of Cocos was an interim measure because:

(a) Cocos was a sport or type of the Gros Michel banana, and hence was subject to Panama Disease (Tr. 756, 1245-46).

(b) Cocos fruit was found to be inferior and was not acceptable in the marketplace because the bananas were short fingered and the bunches were small and open-handed. In particular, the quality of Tiquisate Cocos were inferior to those at Bananera.

(Tr. 872, 1245-46, 1267).

(c) After the initial harvests, Cocos "returned to type," that is, it behaved like other Gros Michel plants and grew tall, thus subjecting the plants to wind damage and blowdowns (Tr. 1246-47, 1267).

(d) As soon as it was determined to proceed with commercial marketing of Valery which was Panama Disease resistant, the Cocos planting stopped (Tr. 1268).

189. United's sale and leasing of lands at Tiquisate prior to the decision to close the division was part of a company-wide program to reduce United's holdings of unproductive land.

(Tr. 735-37).

190. As of the end of 1961, United authorized for sale or other disposal (DX 530, p. 4):

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(a) 93,826 acres in Ecuador.

(b) 101,875 acres in Costa Rica (Golfito, Limon and Quepos).

(c) 89,200 acres in Honduras (about half of which had been leased).

(d) 60,700 acres in Bananera.

(e) 86,600 acres in Tiquisate.

(f) Substantial acreage in other countries (DX 530, p. 4).

191. The Government of Guatemala exerted pressure on United to dispose of lands because of agrarian reform.

(a) In 1954, CAG donated 100,000 acres of land adjacent to its Tiquisate plantations to the Guatemalan Government (Tr. 1317-18).

(b) In December 1960, the Guatemalan President announced near Tiquisate that all unoccupied lands would be turned over to laborers (PX 11).

(c) In 1962 the Guatemalan Congress passed an "Agrarian Law," subject to presidential approval, providing for land expropriation without adequate compensation or provision for court appeal (DX 290).

192. The prospect of losing lands to squatters, as well as threats of violence by squatters, created a necessity for selling or leasing lands in Tiquisate as well as elsewhere (Tr. 827, 1330-31).

193. Leasing or selling land to local Guatemalans for pasture was effective in avoiding loss to squatters particularly where the land was fenced (Tr. 1330-31; PX 11; PX 2234).

194. Leasing land for cotton growing was a means of putting it to productive use thus avoiding government takeover while at the same time preserving the land for future Gros Michel expansion (since cotton plants did not contract Panama disease) (Tr. 735, 1122-23, 1312).

195. Another reason for leasing and selling excess land at Tiquisate and elsewhere was to create revenue to offset losses in the banana business. Thus, CAG sold its

surplus lands at substantial multiples of the lands' book value, with sales totalling more than $5 million by the end of 1961 (Tr. 827-28, 1329; DX 529). and in Guatemala the opportunity for raising such revenue was presented by the demand for land by cotton growers, which it was feared might diminish (Tr. 829, 1329).

196. None of the land sold by CAG was subject to any restriction on its future use (Tr. 828-29, 1123-24, 1334).

197. CAG's authorization for sales of land in western Guatemala are summarized below:

(i) On July 19, 1960, CAG authorized the sale of approximately 17,000 acres of land that was abandoned due to Panama disease and was then leased to cotton growers since CAG "has so much good banana land" (PX 89).

(ii) In December 1960, CAG authorized the sale of approximately 78,000 acres of land in the wind belt area as the least suitable for possible future banana cultivations because of blowdowns; one area "to be retained will consist of some 80,000 acres, of which approximately 60,000 acres is first-class banana land in an area where danger of windstorm is considerably reduced" (PX 88, PX 90).

(iii) On June 15, 1961, CAG authorized the sale of an additional 61,500 acres and that would leave CAG with approximately "50,000 acres of banana land for any future development." (PX 91).

(iv) On October 23, 1962 CAG authorized the sale of 28,104 acres of its land in line with the policy of further reducing its investment in Western Guatemala. This area had been held as reserve land but "in view of recent decisions regarding the future of the Tiquisate Division it is now proposed that it be sold." After selling all land authorized for sale plus the 28,104 acres, "there will remain approximately 27,750 acres in the division, of which 22,125 acres would be suitable for banana cultivation" (PX 143).

(v) On September 23, 1963 United and CAG authorized CAG to close down Tiquisate in 1964 and sell all its land, buildings, machinery and equipment (PX 40, PX 41).

198. At a Manager's Conference on the Guatemala divisions in Boston on September 4 and 5, 1962, "it was definitely decided that the West Coast operations at Tiquisate should be phased out, with 1965 set as the target date for the termination of our activities in this area." (PX 651).

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199. Plaintiff has not proven that any lessees had or expressed the intent, preparedness or capacity to grow bananas on the land they rented, or that United or CAG ever refused a request to lease land for banana growing.

200. During the transitional period, United continued to operate the Tiquisate division and explore means of improving its performance (Tr. 755). Examples of steps taken to improve performance at Tiquisate are as follows:

(a) 1961: Undertree method of irrigation (Tr. 673); construction of boxing stations (Tr. 755).

(b) 1962: Construction and authorization of boxing stations DX 285; DX 254); planting Gros bananas (DX 261).

201. Maintenance at Tiquisate was kept up throughout the contract period (until December 31, 1962) and even into 1963 (Tr. 1237, 1865).

202. The number of carloads shipped by CAG over IRCA was as follows (Amended Complaint ¶ 57).

Year	No. of Carloads
1948	25,632
1949	14,593
1950	21,301
1951	12,440
1952	4,534
1953	16,079
1954	14,710
1955	12,988
1956	14,191
1957	14,435
1958	13,230
1959	13,799
1960	17,559
1961	13,693
1962	7,305
1963	9,177
1964 (through May 31)	6,270

203. The 1961 shipment of 13,693 carloads was in line with the level of business in prior years which was in the general range of 12-14,000 carloads per year.

204. The reduction in shipments from 1961 to 1962 was caused by agronomic circumstances beyond the control of CAG, particularly the following:

(a) There was a reduction in average acreage in bearing by 2,268 acres, the lost acreage principally being Panama diseased and partly land which had been blown and was not worth rehabilitating (DX 548, DX 500 p. 1).

(b) There was a reduction from 200 stems shipped per acre in 1961 to only 137 stems shipped per acre in 1962. The reduction in stems shipped per acre was principally due to the increase in the number of stems lost per acre due to blowdowns from 1961 to 1962 (DX 548). Moreover, the devastating November, 1961 hurricane (Tr. 1244-45; DX 227) also had a substantial adverse effect on quality of the /1962 production (DX 272).

(c) Tiquisate's production in 1962 also was adversely affected by a severe infestation of nematodes (worms that attack the banana plant's root system) (Tr. 1297, 1352-53; DX 252) and by an unusually heavy fallout of volcanic ash from a string of active volcanoes in the Tiquisate area which settled on the plantation and along the railway causing abrasion and scarring of the fruit (DX 282, DX 366, DX 297, Tr. 1281-83).

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205. In 1963, after the expiration of CAG's contract with IRCA, CAG increased its shipments over IRCA from the 8,305 cars in 1962 to 9,177 cars in 1963 (Amended Complaint ¶ 57).

206. In 1964, CAG shipped 6,270 cars over IRCA through the month of May which when projected on an annualized basis, would have resulted in shipment of 15,048 cars -- higher, except for 1960, than any year since 1954. (Id.)

207. In March 1963, Mr. Fox stated to Mr. Chalk that because of the "cost of this freight" [$130], "unless some remedy could be found" to wit, a rate reduction, the company "was facing the possibility of having to close down the division" (DX 526).

208. Haase advised Chalk in connection with Fox's letter that IRCA could not make any downward adjustment in CAG's rate (PX 29).

209. The management of United on September 18, 1963 decided to request authority from its Board of Directors to sell or transfer all of the remaining 30,400 acres in the Tiquisate Division for which it did not then have authority to sell (PX 92).

210. On September 23, 1963, United's Board of Directors decided to sell and dispose of all the assets of the Tiquisate plantations (Tr. 822-23; DX 346, PX 40).

211. While the liquidation was proceeding thereafter, the Tiquisate plantation continued to produce and ship bananas over IRCA until at least May, 1964. (Complaint ¶ 57).

212. United did not place any restrictions on the future use of Tiquisate land by purchasers (Tr. 1124).

213. Plaintiff has not proven the existence of any prospective land purchaser who had the intent, preparedness and capacity to grow bananas at Tiquisate.

214. Plaintiff has not proven that any purchaser with the intent, preparedness and capacity to produce bananas at Tiquisate was prevented by United from acquiring land.

215. During the liquidation, United approved retaining an agent to publicize the availability of the lands and expedite sales. (Tr. 826).

216. Those selling land for United were not instructed to refrain from selling land to banana growers (Tr. 829).

217. The availability of Tiquisate land was made known in a letter to the Guatemalan government to all Government Ministers, Chalk (PX 43,PX 45), and other various persons and firms.

218. Many of the purchasers of Tiquisate land used it for cotton growing not because of any action by United, but because of the economic and agronomic advantages of this use (Tr. 829, 1329).

(a) There was an economic boom in cotton in Guatemala at the time which in turn led to a demand for land to be used for that purpose (Id.).

(b) The climatic and other reasons that prevented the profitable production of bananas in Tiquisate were not applicable to cotton; particularly, cotton was a low growing plant which did not blow down; cotton plants did not get Panama disease; cotton could be transported by truck and was not easily damaged in transportation; cotton

could be and was shipped out of West Coast ports to Japan and elsewhere; cotton was inexpensive to grow and did not require the agricultural care which bananas did (Tr. 1343-44; 1329, 829, 375).

(c) The land in Tiquisate was excellent for cotton growing and cotton could be grown on abandoned Panama diseased land (Tr. 829, 1329, 1343).

(d) The government encouraged development of the cotton industry, which was run by nationals, both for export and domestic textile production.

219. Plaintiff has not proven that there were any offers to buy land for bananas.

220. The government did not encourage the use of land in western Guatemala for bananas, as did the government in Ecuador with regard to land located there to the contrary, the Guatemalan Minister of Agriculture was "categorically opposed to having [the Tiquisate lands] turned over to the workers to continue with the banana plantations, as he was positive they would end in a complete downfall. . . ." (DX 521B p. 5).

(a) The Guatemalan government did nothing to encourage banana growing on the 100,000 acres adjoining

Tiquisate that United had donated to the government in 1954 (Tr. 1317-18).

(b) The Guatemalan government encouraged land for cultivation of other products such as cotton or other operations such as livestock because of its concern that the land remain productive and contribute to the Guatemalan economy (DX 521B p. 5).

221. Plaintiff has not proven that United disposed of the equipment, tools and other assets of the Tiquisate division in order to prevent banana production by purchasers, who otherwise had the intent, preparedness and capacity of doing so.

222. United sold Tiquisate agricultural equipment to the land purchasers who wanted it. (Tr. 830).

223. Other equipment, such as cast iron irrigation pipe and Sigatoka pipe, which was not sold, was transferred to Bananera or other divisions for the following reasons:

(a) Much of the equipment such as cast iron irrigation pipe was more valuable than the land itself and land purchasers did not always offer to buy it (Tr. 829-30).

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(b) Equipment such as irrigation pipe was of no use for cotton growing, which required no irrigation (Tr. 1343-48).

224. Agricultural equipment from Tiquisate that was not purchased was transferred to the Bananera division because:

(a) The plantations there were being converted to Valery and expanded (Tr. 830-31, DX 521, DX 48).

(b) United advised the Guatemala Government that the assets being used to expand the Bananera plantation through the planting of Valery benefitted the country's economy (DX 521).

225. [DELETED]

226. CAG left the major facilities at the Tiquisate installation intact.

(a) The hospital, radio telecommunications and telephone facilities were all donated to the State (DX 521, PX 92).

(b) Drinking water installations, electrical facilities and mechanical, carpentry and saw mill workshops were sold to local interests so that the Tiquisate economy would remain viable (DX 521, PX 92).

227. It was not United's policy to refrain from selling Tiquisate to a banana producer and in fact, it made affirmative attempts to do so, but the prospective purchasers were not interested in buying.

228. In furtherance of its policy, Mr. Sunderland and others at United had a number of discussions with a number of people including persons already in the banana business concerning the sale of a division under the consent decree in which it was the practice to catalog all the divisions including Tiquisate and provide a thumbnail sketch of each division (Tr. 836-37).

229. None of these persons offered to purchase Tiquisate; several expressed disinterest; and Sunderland

learned that the Tiquisate division was not highly regarded by those who knew the banana business (Tr. 837).

(a) Mr. Staff of the Ecuadorian Fruit Company, which was United's second largest competitor, "said flatly he wouldn't have Tiquisate as a gift because he didn't think bananas could be grown profitably there to be sold competitively in the United States market" (Tr. 837). In a conversation with Sunderland in 1960, Staff advised Sunderland that he was interested in United's Almirante division (PX 1363, p. 26).

(b) In another conversation with Mr. Staff and his associates, on November 29, 1963,

Mr. Sunderland and Mr. Fox, who conducted the discussion on behalf of United, did not specifically mention or exclude any particular division but merely stated "We will certainly be glad to consider all prospective bidders" and "What would you choose if you were to choose one?" (PX 1363, pp. 21-22). Ecuadorian Fruit Company representatives, on their own, again expressed a preference for Almirante because it had "the most fertile soil" and "a pretty good record for blowdowns " (PX 1363, pp. 24-25).

(c) Mr. Sunderland discussed sale of Tiquisate with Mr. Consolo, the head of another

competitor in the banana business, but Consolo also expressed no interest (Tr. 837).

(d) In May 1963, United furnished to the West Indies Fruit Company, one of its leading competitors, copies of a prospectus covering the assets of Tiquisate, as well as Bananera and Bocas; and in a general discussion of assets, acreage, production and sale, West Indies said it was interested in an outright purchase and even as to a partial spin-off, it had a "real problem" in how it could "swing such a deal with an investment of around $1,000,000" (DX 333-p. 2 of attached memo dated May 6-7, 1965).

230. United was prohibited by Paragraph VIII(D) of the consent decree from selling a division to Standard Fruit which was its biggest single competitor and therefore did not discuss a sale of Tiquisate with Standard (Tr. 836-37)

231. O. Roy Chalk was elected a director of IRCA on November 2, 1962 and was Chairman of the Board from 1963 to 1966 (DX 552, pp. 40, 43-52, DX 567). Chalk was also the majority shareholder of Transportation Corporation of America (TCA), which had purchased 242,600 shares of IRCA stock from BSF Company on October 25, 1962 and owned a controlling interest in IRCA (DX 565 p. 3).

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232. Plaintiff has failed to prove that Chalk had the intent, preparedness and capacity to purchase the Tiquisate division.

233. Plaintiff has failed to establish Chalk's ability to finance the establishment of a banana production company by purchasing the lands, equipment and facilities necessary to engage in such business at Tiquisate. To the contrary, Chalk admitted his lack of financial capability.

(a) Chalk said that his interest in purchasing United's Guatemalan plantations was expressed on behalf of a company other than TCA (PX 37, 2d ¶). The other company was not identified and its financial capability to purchase was not proven.

(b) Chalk said that the proposed acquisition of Tiquisate would not be made by IRCA and he would not commit his IRCA stock as security (DX 496 pp. 8-9).

(c) Chalk said that "his interest was in buying cheap" (DX 496 p. 3). Chalk said that he was not interested in an outright purchase under paragraph B of the consent decree because "this paragraph necessarily called for a real money negotiation" (Id.)

(d) Under paragraph C of the consent decree (DX 498 ¶ VIII C) which provides for the transfer of a partial

interest in a new company, Chalk indicated "that it might be difficult to find a lender outside of United" (DX 496 p. 8); however, "it was unclear what security Mr. Chalk would be prepared to offer for this loan" (Id.) and "presumably, the Department of Justice would object to a loan [by United] secured by a controlling interest in the New Company represented by the whole number of shares acquired by Mr. Chalk" (Id.). In fact, Allen Dobie of the Department of Justice expressed "particular concern" as to whether United would "retain any interest at all in banana operations on the west coast" (PX 68 p. 4) and thus implicitly rejected the only financial arrangement which Chalk had suggested.

234. Plaintiff has failed to prove that Chalk took timely and substantial affirmative action to acquire Tiquisate.

(a) Chalk never made a firm offer to purchase Tiquisate (Tr. of Oral Argument of June 27, 1974, p. 103, lines 2-3).

(b) On January 11, 1963, Fox advised Chalk that if the Tiquisate division's cash flow became negative, United would withdraw from the operation unless alternative uses for the property could be found (PX 27).

(c) On March 27, 1963, Fox advised Chalk that if the present trend in operating figures at Tiquisate continued, United would soon have no alternative but to discontinue operations (DX 526).

(d) In August 1963, United advised Chalk that it planned to close Tiquisate when it went into the red on a cash flow basis and it furnished Chalk with a copy of the consent decree in regard to the possibility of his purchasing Tiquisate (PX 988).

(e) On September 30, 1963, Chalk discussed the purchase of Tiquisate but made no offer (DX 496; Tr. 864).

(f) In a letter dated October 9, 1963 and delivered to the President of Guatemala on October 23, 1963 (DX 521, DX 521A), the Guatemalan government was advised by Sunderland that a decision had been made to liquidate the Tiquisate operations and that the plan would be executed so that business would be closed in full by 1964.

(g) Shortly after October 9, 1963, Fox advised Chalk that a decision had been made to close down the Tiquisate operation and that the Guatemalan government had been so advised (Tr. 1708, 859-60; PX 45 p. 3; DX 521, DX 521A).

(h) By letter dated November 1, 1963, United advised Chalk that "time is short" and that a "number

of persons have expressed interest in acquiring certain of the assets of the [Tiquisate] Division" (PX 43 p. 3).

235. United enclosed a breakdown of the production and transportation assets of CAG stating their approximate cost ($23,000,000) and also the amount United expected to realize from a sale on a strictly salvage basis ($6,500,000). United stated that the value of the division as a continuing and going concern to someone interested in producing and exporting bananas would be substantially over the salvage figure (PX 43, p. 3 and Conclusion on 7th sheet).

236. Chalk did not reply to this letter.

(a) The next contact with Chalk was not until November 18, 1963; a telephone conversation with Fox in which Chalk said "it would be a waste of time to take the matter of compliance with the Consent Decree up with the officials at the Department of Justice." While Chalk expressed interest in purchasing the land at Tiquisate, he made no offer or attempt to do so even though Fox advised that he would be glad to have him bid for properties on the market (PX 69, PX 45 p. 2; Tr. 1709-10); and shortly thereafter, he reverted to his earlier position of insisting on

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proceeding under the consent decree (PX 46, PX 68).

(b) Despite previous warnings, Chalk took no action until December 18, 1963, when he visited the Department of Justice; but he still made no concrete proposal and did not obtain Department approval for any plan of compliance with the decree involving Tiquisate (PX 68).

(c) On December 23, 1963 in a telephone conversation (PX 788), confirmed by a letter of the same date, Chalk was advised that substantial quantities of Tiquisate property had been sold or committed and that the commitments will be honored (PX 45 p.2; PX 788 pp. 1-2). Nevertheless, Chalk not only refrained from making an offer to purchase any remaining land, he refused to pay for an option requiring United to hold such off the market (PX 788 p. 15).

237. Chalk's absence of intent and preparedness to purchase Tiquisate and establish a banana business there is evidenced by the unrealistic demands which he made throughout the negotiations with United.

(a) In the September 1963 meeting with United , , Chalk rejected an outright purchase of land and other assets under paragraph B of the decree because that would call for "real money"; and his

interest was in buying "cheap"; he could not raise more than one million dollars in cash and had no means of financing; nevertheless, Chalk stated that he required:

> -- a few "top men" from United such as Mr. Fox, as well as other able managerial personnel;
>
> -- a "fair share" of United's distribution system;
>
> -- United's "new ships";
>
> -- "the best of United's modern fleet." (DX 496, pp. 4-6; Tr. 848-50).

(b) At the September 30, 1963 meeting, Chalk expressed interest in acquiring both Guatemala divisions of United even though he said he could not pay more than $1 million cash (DX 496 p. 8). United decided that it did not wish to sell the Bananaera division at that time because it was under consideration as a possible location for Valery planting (Tr. 1707-08). Chalk then said it would be a waste of time to make arrangements under the consent decree in view of United's unwillingness to dispose of Bananera (PX 69).

238. On December 30, 1963 Chalk sent a letter to Fox (copy to the Assistant Attorney General at the Department of Justice) advising "we would be prepared to go forward under a plan satisfactory to us which we would like to discuss with

you whereby the production of such 9,000,000 stems per annum (if this possible in the western area of Guatemala) be instituted in conjunction with associate Guatemalan producers." Chalk further advised "we can assure you that our contemplated banana operation will be an aggressive one and you may rest assured that we will be a very formidable and active competitor to bring into reality the objective underlying the Department of Justice and the Court's ruling in the United Fruit Company case. . . . Pending negotiations of the deal upon mutually satisfactory terms it would be appreciated if you would keep the necessary property available to us for a reasonable period of time to conclude this transaction" (PX 46).

239. In a letter dated December 30, 1963 (PX 46) in response to Fox's letter of December 23, 1963 (PX 45) Chalk said that he "would like to discuss" a plan under which he would obtain 10,000 acres of the "best land" in Tiquisate for $100 an acre" (whereas United had been selling land to others for $100 to $125 an acre depending on its condition (Tr. 1716; PX 45 p. 3). For the same $100 an acre, Chalk demanded in addition to land, "all of the facilities stated, intended and implied" under paragraphs A, B and C of the consent decree (PX 46 p. 2). Chalk thus demanded distribution facilities, management personnel

and ships (as well as the assets other than land located at Tiquisate (PX 43 attach.)) for the same $100 an acre which was the minimum price United was accepting for land alone (Tr. 1716). The facilities were worth much more. The ships which Chalk had previously demanded were alone valued at at least $5 million each (Tr. 848).

240. Chalk was only interested in proceeding under the decree because he did not have the financial capability to make an outright purchase of Tiquisate assets and because he thought he could obtain management, transportation and other facilities under the decree. Even under the decree, Chalk was only interested in a partial spin-off under paragraph C because an outright purchase under paragraph B involved a real money negotiation and he was interested in buying cheap.

241. United had legitimate reasons, apart from Chalk's conceded inability to finance such an arrangement, for declining to enter into a partial spin-off arrangement with Chalk under the consent decree.

(a) The Department of Justice expressed concern that Tiquisate could produce 9 million stems of bananas only if a "variety" banana were grown, whereas the

decree contemplated Gros Michel as the prevalent botanical type (PX 68 pp. 4-5; DX 498 ¶ VIII A, B, C).

(b) United believed in 1963 that the government might require a division capable of producing 9 million stems of Gros Michel bananas because that was the type predominantly being imported into the United States, and Valery had not yet become a commercial reality (Tr. 816-17, 810-810A).

(c) The Department of Justice expressed concern whether Chalk would meet the eligible person requirement of the decree (PX 68 p. 4). United also was concerned with whether Chalk could meet the eligible person requirement (DX 417 p. 4; DX 498 ¶ VIII D).

(d) The Department of Justice expressed particular concern with United's retaining an interest in Tiquisate banana operations which would have occurred under the financial plan suggested by Chalk (PX 68 p. 4; DX 496 pp. 8-19).

(e) The decree implicitly rejected joing ownership of the railroad and banana plantations (DX 498 2 VII).

(f) Hugh Cox of Covington & Burling in Washington, D.C., who was United's principal legal advisor

on compliance with the decree, told Mr. Sunderland that "he had had informal discussions with the Department of Justice and they had indicated they would not be satisfied with Tiquisate." (Tr. 818-20).

(g) Mr. Sunderland concluded that if Tiquisate, being one of United's worst divisions, was submitted as a basis for compliance with the consent decree, the Department of Justice would be suspicious that United was not attempting in good faith to create a viable competing company (Tr. 818-20).

(h) It was undesirable to spin-off Tiquisate to United's shareholders because that division was unprofitable and had climatic and agronomic obstacles to successful banana production (Tr. 820-21).

(i) A partial spin-off created problems of valuation and whether the consideration received from the partial purchaser was adequate -- a problem which did not exist with a complete spin-off only to United's shareholders (Tr. 813, 850).

242. On January 9, 1964, United decided not to proceed further with Chalk in part because of the obstacles to the arrangements which Chalk proposed under the consent decree (GX 417) and United's legitimate reasons for proceeding differently under the decree including:

-- Under a full spin-off, no shareholder could question the amount accepted by United for a division from a third party.

-- Under paragraph A the new company would have experienced management, good production facilities and adequate financing.

-- Under a partial spin-off, if the new company failed due to poor management, United's shareholders who held a partial interest would suffer and United might be responsible for their loss (DX 417 p. 4; Tr. 812, 862).

(b) Under paragraph A of the consent decree, the Armuelles division was the primary candidate for divestiture and no one would question the selection of that division since it was United's best producing division and it could supply both the East and West Coast of the United States. United decided to "gear up" for compliance under Plan A through a divestiture of Armuelles, and such a plan was later accepted by the Department of Justice and the Court but rejected by the Government of Panama (Tr. 808-10, 822).

(c) A second alternative was consideration of a substantial cash offer for assets under Plan B of the decree (DX 417 p. 7) which Chalk had refused to even consider.

243. Another reason that United decided on January 9, 1964 not to proceed further with Chalk was Mr. Sunderland's view that United did not have a firm offer of any kind, that negotiations gave no indication of any sincere effort to want to acquire Tiquisate property, and that if United was going to close the division, it would have to proceed promptly in order not to encourage adverse government action, strikes by employees and loss of opportunity to obtain valuable consideration for the land which was then in demand (Tr. 858-64, see also Tr. 1128, 1142).

(a) In January 1964, the Guatemalan government placed an embargo on United's land sales.

(b) There were indications of potential government interference with the closing and liquidation of Tiquisate which United could not ignore in light of the fact that it planned to remain in Bananera (DX 521B).

244. Plaintiff has not demonstrated why if Chalk had the intent, preparedness and capacibility to enter the banana business in Western Guatemala:

(a) He failed to purchase any part of the 50,000 acres in Western Guatemala which were not owned

by CAG and which were available, including the land on which Standard previously had grown bananas (Tr. 1335).

(b) He did not attempt to seek to acquire or make arrangements with the government for the cultivation of bananas on the 100,000 acres adjoining Tiquisate which CAG had ceded to the government in 1954 (Tr. 1317-18).

(c) He did not repurchase lands which United had sold or committed, but on which it continued to produce bananas into 1964 (and which of necessity must also have contained the necessary irrigation pipe and other equipment to enable United to have continued this production) (PX 1557 p. 3).

245. Throughout the negotiation, United had made a good faith effort to sell Tiquisate to Chalk.

(a) United supplied Chalk with detailed data which he requested (PX 43).

(b) United provided dollar figures which were intended to give Chalk an indication of the bracket of price from which negotiations could begin (PX 43 p. 7; Tr. 1707).

(c) United promptly answered Chalk's inquiries and followed up with telephone calls when their

responses were ignored (e.g., PX 27 (Meeting January 11, 1963) -- PX 29 (Fox reiterates unanswered questions in letter of March 27, 1963); PX 43 (United's letter to Chalk dated November 1, 1963); PX 69 (United's telephone call to Chalk of November 18, 1963)).

(d) Sunderland and Fox tried to sell Chalk the Division and thus described Tiquisate in the most favorable terms they could without emphasizing its disadvantages compared with United's other company-owned divisions (PX 788 pp. 11-13, 28, PX 43 p.2; Tr. 1723).

(e) United pursued the negotiations in meetings and telephone calls, and complied, and submitted data to Chalk, over a period of almost six months even though Chalk made unrealistic demands and never made a firm offer.

CONCLUSIONS OF LAW

1. Plaintiff has failed to prove that United entered into a "contract combination or conspiracy" to unreasonably restrain trade and commerce in the importation of bananas into the United States.

2. United did not engage in a conspiracy to boycott IRCA:

(a) Plaintiff has failed to prove that United imposed any restrictions on the sale of Tiquisate land or that United asked -- much less agreed with -- any purchaser of such land not to deal with IRCA.

3. Plaintiff has failed to prove that the alleged concerted actions resulted in a significant and unreasonable restraint of competition in the importation of bananas into the United States.

4. (First Claim) Plaintiff has failed to prove that the acts and practices complained of excluded or deterred anyone with the requisite intent, preparedness and capacity from importing bananas into the United States from Guatemala or from anywhere else in Central and South America and the Caribbean.

5. (Third Claim) The closing of Tiquisate was not an act in maintenance of monopoly power, but was part of a company-wide policy dictated by legitimate business considerations to shift United's production from Gros Michel to Valery, to close down those divisions less suited for the production of Valery because it required less land,

and to transfer United's Guatemalan production from the West Coast to the East Coast which was closer to port and where abandoned Panama diseased land was available for Valery production.

6. Plaintiff has not proven that the closing of Tiquisate was either intended to or had the effect of excluding competition from the importation of bananas into the United States or enabling United to control prices in that market.

7. The operation of Tiquisate during the transitional period that United was developing the Valery bananas was predicated on legitimate business decisions including cost reduction, reduction in capital expenditures on Gros Michel bananas due to the impending conversion to Valery and other considerations which were not in willful maintenance of any monopoly power.

8. (First Claim) Since February 1958, United operated under and complied with the consent decree prohibiting contracts which required IRCA to discriminate and requiring United to divest its IRCA stock.

(a) United reviewed all outstanding contracts to assure compliance with the decree and

communicated with IRCA's counsel who in turn communicated with Ripley plaintiffs' counsel. All concurred that none of the contracts required discrimination and one questionable clause to which no one had paid attention for many years was formally cancelled.

(b) United sold virtually all of its IRCA stock in January 1962 and prior thereto made diligent efforts to effect a sale.

(c) At no time was it Sunderland's intention that United keep the IRCA stock so that it could be used to exercise control over IRCA's management.

(d) United refrained from exercising control over IRCA so as to require IRCA to discriminate.

9. (First Claim) During the limitations period, United and IRCA were operating pursuant to the Ripley judgment and the contracts held to continue in force under that judgment.

10. Prior to the conclusion of Ripley, relationships between United and IRCA were in the hands of parties' respective attorneys pending the outcome of the litigation. Plaintiff has not proven that United exercised control over IRCA so as to require it to discriminate or that it did so with the requisite specific and unlawful intent.

11. (Third Claim) Sunderland recommended closing Tiquisate for legitimate business reasons, not so that United could achieve monopoly power in the importation of bananas.

12. Sunderland, who made all key decisions regarding the operation and closing of Tiquisate, as well as concerning United's relationship with IRCA, did not take any action with specific intent to monopolize; to the contrary, he took affirmative steps to assure that United complied both with the consent decree and the antitrust laws.

13. (Third Claim) United did not aim the decision to close or the method of liquidating Tiquisate at IRCA as reprisal for its insistence on the fulfillment of the Ripley judgment.

(a) Sunderland who made the decision to recommend closing of Tiquisate did so based on legitimate business considerations, particularly the development of Valery, the consequent need for less land and fewer divisions; and the advice of his expert staff that Tiquisate was the worst company division in which to grow Valery.

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(b) The Ripley case did not materially affect Sunderland's decisions regarding the operation or closing of Tiquisate.

(c) Sunderland did not make the decision to recommend closing for the purpose of directly harming IRCA or to achieve repirsal for Ripley.

(d) After the appeals from the Ripley judgment were denied in or about December 1960, Sunderland reviewed the matter with United's attorneys and relied upon their advise in deciding what United had to do to comply.

(e) .The overwhelming facts leading to the decision to close Tiquisate pertained not to the IRCA freight rate but to Tiquisate's disadvantages in the production of Valery compared to other divisions, and its prospect for the least profitability, considered with the fact that with the advent of Valery, United did not need all the divisions it had.

(f) After the Ripley appeals, in 1961 United assessed the effect of the higher freight rate because it was a factor representing 6.2% of the tropical cost and 5.[illegible]% of the selling price, and thus contributed to the fact that the Tiquisate division was losing money.

(g) Even if Tiquisate had been closed because of the amount of the freight rate (which is not so), that would not constitute reprisal for the fulfillment of the Ripley judgment because the judgment did not preclude any reduction in the freight rate. Indeed, the judgment expressly provided for that eventuality:

> "[E]quity and fair dealing require that Compania Agricola de Guatemala . . . pay to defendant International Railways of Central America $130 per car of bananas for export . . . until such time as defendant International Railways of Central America promulgates a rate or charge to the general public for transportation of bananas for export from the west coast of Guatemala to Puerto Barrios, Guatemala, different from the $130 car rate or charge presently applicable to the general public for such transportation, in which event and at such time Compania Agricola de Guatemala shall pay for such transportation the same rate or charge as promulgated for the general public."

(h) The fact that United advised IRCA that it would like a reduction in the freight rate does not mean that United intended to act in reprisal if IRCA refused; to the contrary, as IRCA's president conceded "it was perfectly understandable" to consider rates since the Tiquisate division was losing money and the rate was a factor -- indeed, the only factor that IRCA could do anything about.

Nevertheless, United also advised IRCA of the reasons for closing which included the development of Valery, heavy wind losses, bruising and over-ripening of the fruit on the long bumpy rail haul, the division's losses and comparatively high costs.

(i) Closing Tiquisate was pursuant to company-wide policy -- not aimed at IRCA -- because other divisions were closed and land sold in all divisions for the same reasons which had nothing to do with IRCA or Ripley.

14. (Third Claim) The operation of Tiquisate during the transitional period of development and conversion of the Company's production to Valery not only did not involve any cutback in production, but it was not for the purpose of directly harming IRCA because of the Ripley judgment.

(a) Operations were based on company-wide policy directed to reducing capital expenditures and costs to improve poor financial results and not expanding Gros Michel cultivations in view of heavy Panama disease losses and expenditures, and the impending shift to Valery.

(b) Tiquisate production and shipments were affected by Panama disease, windstorms and other

agronomic factors beyond United's control.

15. Plaintiff has failed to prove that it was injured in its business or property as a proximate result of the alleged acts complained of.

16. Plaintiff has failed to prove that it was injured by any alleged discriminatory rates or practices in which it engaged on that any such alleged discrimination by plaintiff was the proximate result of any unlawful act of United.

17. Plaintiff has failed to prove that it was injured from loss of profits on banana shipments by a producer other than United as a proximate result of any alleged unlawful act of United.

18. Plaintiff has failed to prove that it would have made a profit on shipments by some other banana producer.

19. Plaintiff has failed to prove that anyone had the intent, preparedness and capacity to purchase the Tiquisate division, develop its banana business and ship via IRCA, and would in fact have done so absent the alleged

restrictions on the use of land sold by United (which restrictions did not exist); or absent United's alleged refusal to sell to such producer (which is not the case).

20. Plaintiff has not proven a clear causal connection between any of the alleged violations which occurred prior to February 16, 1961 and injury suffered after February 16, 1961.

21. Plaintiff has not proven that it suffered injury after February 16, 1961 proximately caused by United's alleged utilization of stock ownership prior thereto to substantially lessen competition in the importation of bananas.

January 29, 1975

MURRAY I. GURFEIN, U.S. Circuit Judge
Sitting by Designation

FOOTNOTES

1. PX = Plaintiff's Exhibit

DX = Defendant's Exhibit

Tr. = Transcript

"United" is used to describe United Fruit Company rather than "UF" because both parties so designated it in their proposed findings.

2. Certain findings of fact by Referee Hammer in the Ripley action were admitted in this action for limited purposes of collateral estoppel by order dated April 25, 1974. See Finding of Fact No. 19, infra. These findings are identified by Referee Hammer's original designations.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, 370A Plaintiff,	:	UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
-against-	:	65 Civ. 479 - MIG
UNITED BRANDS COMPANY, Defendant.	:	
- - - - - - - - - - - - - - - - - - - -	x	
INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff,	:	
-against-	:	72 Civ. 649 - MIG
COMPANIA AGRICOLA DE GUATEMALA, Defendant.	:	
- - - - - - - - - - - - - - - - - - - -	x	

JUDGMENT

This action having been consolidated pursuant to an order dated February 14, 1972, and having come on for trial before the Court, Honorable Murray I. Gurfein, United States Circuit Judge sitting by designation, presiding, the issues having been tried on January 23, 24, 25, 28, 29, 30, 31 and February 1, 4, 5 and March 5, 6, 7 and 11, 1974; and the Court having filed an opinion together with findings of fact and conclusions of law on January 29, 1975, dismissing the complaint and directing that judgment be entered for defendants, it is

ORDERED AND ADJUDGED that the action be dismissed on the merits and with prejudice, and that the defendants United Brands Company and Compania Agricola de Guatemala recover their costs after action from the plaintiff International Railways of Central America.

Dated: New York, New York
February 7, 1975

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Filed
U.S. District Court
Mar 6 2:09 PM '75
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

-against-

UNITED BRANDS COMPANY,

Defendant.

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65 Civ. 479 - MIG

NOTICE OF APPEAL

Notice is hereby given that plaintiff International Railways of Central America hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the final judgment entered in this action on the 7th day of February, 1975, including without limitation, review of Decision #41825 and Findings of Fact and Conclusions of Law #41825-A entered on January 29, 1975, Decision #40643 and the orders entered on April 26, 1974 and May 15, 1974 and Decision #39465 and order entered on May 9, 1973.

Dated: March 6, 1975

Sidney Bender

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312A

Filed
U.S. District Court
Mar 6 2 11 PM '75
S.D. of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff,

-against-

COMPANIA AGRICOLA DE GUATEMALA,

Defendant.

72 Civ. 649 - MIG

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Dated: March 6, 1975

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